Supreme Court, U.S.
FILED

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No. (1) 09-252 AUG 26 2009

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In The

Supreme Court of the United States

JOHN GERARD QUINN,

Petitioner,

v.

JOHN ROACH, GAIL LEYKO, MANUEL GONZALES, CURTIS HOWARD, KRISTI TYLER, MICHELLE VOIRON, JOSE QUILES, COLLIN COUNTY, TEXAS, and the CITY OF McKINNEY, TEXAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

John Quinn was arrested for aggravated sexual assault of a child involving his minor daughter, Katie Quinn. It is undisputed that the only evidence the police had in their possession before applying for the arrest warrant was the uncorroborated outcry of Katie, made on the day she was arrested for shoplifting and while attempting suicide, eight years after the alleged assault supposedly occurred. Mr. Quinn was never indicted and the charges were dismissed.

Quinn sued the arresting officer and the City of McKinney, Texas under 42 U.S.C. §1983 for violation of his civil rights under the Fourth Amendment for arresting him without probable cause. The lower courts dismissed Quinn's claims based on qualified immunity.

1. Did the lower courts err by granting qualified immunity to Officer Quiles *not* based on the analysis required by this Court, but by invoking a Fifth-Circuit-only process whereby they ignored the state of the law and instead answered fact questions concerning the conduct of the defendant as a "subpart" of the qualified immunity analysis?

After he was arrested, Quinn spent almost 17 months on bond even though an on-point Texas statute, modeled on the invitation found in *Barker v.*

QUESTIONS PRESENTED – Continued

Wingo, 407 U.S. 514 (1972), required the Prosecutors to either dismiss the charges or bring the case to the grand jury within nine months of the arrest. Quinn sued the Prosecutors and Collin County, Texas under §1983 for violation of his rights to "speedy trial" under the Sixth Amendment, and for violating his due process rights under the Fifth and Fourteenth Amendments. The lower courts dismissed these claims based on prosecutorial, qualified, and Eleventh Amendment/sovereign immunity.

2. Is a prosecutor entitled to prosecutorial immunity when he has not overcome the presumption that no such immunity exists, when he has not shown that his functions were entitled to immunity in 1871, when the subject conduct did not involve "advocacy," and when he has not shown that current public policy supports the continued application of such immunity to those functions?

3. Is a prosecutor entitled to any form of immunity from §1983 claims when he violates an administrative statute expressly designed to ensure the "speedy trial" rights of criminal defendants under the Sixth Amendment?

4. Is any defendant entitled to sovereign immunity under any circumstances when he is sued in his individual capacity?

QUESTIONS PRESENTED – Continued

Finally, the Fifth Circuit held that a §1983 plaintiff may not recover money damages for violation of the Sixth Amendment. This issue presents a question of first impression:

5. May a §1983 plaintiff recover money damages for violation of his Sixth Amendment right to a speedy trial if he can prove such damages were proximately caused by the violation?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

John Quinn petitions this Honorable Court for a writ of certiorari to review and correct the decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit dated May 4, 2009, is set forth in the Appendix at App. 1-29. The order of the Fifth Circuit denying *en banc* review is set forth at App. 44-45. The judgment is set forth at App. 42-43.[1] The opinion of the United States District Court for the Eastern District of Texas dated March 23, 2007 is set forth at App. 30-41. The opinion of the United States District Court dated March 31, 2008, is set forth at S. App. 1.

BASIS FOR JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its panel opinion on May 4, 2009, and

[1] The Fifth Circuit did not issue a separate document called a "judgment" in this case. App. 42-43 constitutes the judgment according to the Fifth Circuit's clerk.

denied a petition for rehearing *en banc* on June 3, 2009.[2] This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the relevant Constitutional Amendments and statutory provisions are set forth at App. 46-49.

STATEMENT OF THE CASE

Introduction.

In every circuit except the Fifth, when qualified immunity is raised as a defense, the court answers two legal questions to make its ruling. The first question is similar to the standard under FRCP 12(b)(6) and asks whether the plaintiff has pleaded sufficiently to support a cause of action for violation of his constitutional rights. The second question asks whether the state of the law on the date of the conduct in question was such that officials of reasonable competence should have known the conduct under review was unconstitutional.

[2] Under Supreme Court Rule 13.3, the Fifth Circuit treats petitions for rehearing *en banc* as petitions for panel rehearing. Local Rule 35 for the Fifth Circuit, I.O.P.

This second inquiry does *not* ask whether the defendant's conduct itself was unreasonable or illegal so as to support a liability finding. Rather, it asks whether the law was clear enough to have given "fair warning" that the conduct alleged by the plaintiff was unconstitutional such that defendants of reasonable competence would have known it was improper.

The Fifth Circuit also is in conflict with this Court and the other circuits on the issue of prosecutorial immunity. The Court has formulated presumptions that must be overcome in order to obtain such immunity, and has held that in all but the rarest cases prosecutorial immunity should be denied because qualified immunity is sufficient to protect prosecutors from liability in those situations where they deserve protection.

Both of these immunity issues were decided wrongly by the Fifth Circuit because the court got the wrong result and because the court employed the wrong analyses in coming to its conclusions and, in the process, disregarded the settled precedents of this Court and placed itself in conflict with the decisions of every other circuit.

Factual History.

Petitioner was arrested on September 9, 2004 on charges that he sexually assaulted his own daughter back in 1996. The police officer who swore out the arrest warrant, Officer Quiles, admitted in his deposition that the only information supporting his

decision to arrest Quinn was the uncorroborated, eight-year-old outcry of Quinn's then-sixteen year old daughter, Katie Quinn, a witness of unknown reliability whose outcry was made on the same day she was arrested for shoplifting and while she was so distraught (or so intent on deflecting attention away from her arrest) that she was supposedly attempting to kill herself.

Following his arrest, Quinn was forced to remain on bond for 17 months because the Prosecutors would not dismiss the charges or bring them to a grand jury even though an on-point statute admittedly compelled this action. Based on the absence of probable cause to believe a crime had been committed, Quinn was eventually "no billed" by the grand jury.

Procedural History.

Quinn filed suit against Officer Quiles and the Collin County Prosecutors under 42 U.S.C. §1983 and brought state-law claims for malicious prosecution, false arrest/detention, negligence, negligence per se, gross negligence, and intentional infliction of severe mental anguish. He also sought injunctive relief.

The Prosecutors filed a FRCP 12(b)(6) motion to dismiss, and Officer Quiles filed a FRCP 56 motion for summary judgment. The gravamen of the dismissal and summary judgment motions was that the claims were all supposedly barred by various forms of immunity. The District Court dismissed all claims against the Prosecutors based on prosecutorial

immunity, qualified immunity, and Eleventh Amendment/sovereign immunity. The District Court dismissed the claims against Officer Quiles based on qualified immunity and state-law official immunity.

Quinn appealed. A three-judge panel of the Fifth Circuit Court of Appeals affirmed the rulings of the District Court, and *en banc* review was denied. This Petition followed.

The basis for federal jurisdiction in the court of first instance was 28 U.S.C. §1331 (federal question), 28 U.S.C. §1367 (supplemental jurisdiction), and 42 U.S.C. §1983 (civil rights violations).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit failed to follow this Court's settled rules related to qualified immunity. Instead, it applied its own unique methodology wherein it decided whether the defendant's conduct was, in the court's view, factually "reasonable" rather than by deciding only whether the state of the law was or was not clear enough to provide the defendant with fair warning that his alleged conduct was unconstitutional.

The ruling below is in direct conflict with every qualified immunity decision ever made by this Court and with the decisions of every other circuit court of appeals that has addressed the same issues. Not only does that ruling confuse the law, but it leaves future

courts with a decision they could "follow" potentially leading to even more erroneous decisions on this important Constitutional issue. The Fifth Circuit's decision conflicts with the following cases:

Hale v. Fish, 899 F.2d 390 (5th Cir. 1990) (making an arrest based only on an uncorroborated story from an informant of unknown reliability is unconstitutional; creating an inter-circuit conflict)

Harlow v. Fitzgerald, 457 U.S. 800 (1982) (qualified immunity only afforded if the law was unclear that the alleged conduct was unconstitutional)

Hope v. Pelzer, 536 U.S. 730 (2002) (court engages in a two-step inquiry when determining qualified immunity, neither of which involve determining any questions of fact)

Malley v. Briggs, 475 U.S. 335 (1986) (qualified immunity only afforded if the law was unclear at the time of the defendant's conduct)

Ripson v. Alles, 21 F.3d 805 (8th Cir. 1994) (the uncorroborated outcry of an informant of unknown reliability in a child sexual assault case is insufficient to support probable cause under the Fourth Amendment and an arrest made under these circumstances triggers §1983 liability; no qualified immunity available to the defendant)

Saucier v. Katz, 533 U.S. 194 (2001) (qualified immunity requires a two-step process similar to Rule 12(b)(6) coupled with fair warning)

The Fifth Circuit also violated this Court's precedents related to prosecutorial immunity and thereby placed itself in conflict with every other circuit court. Specifically, the Fifth Circuit ignored the presumption that prosecutorial immunity does not exist, it did not make the defendants overcome this Court's "no immunity" presumptions, and it granted immunity for purely administrative conduct not involving advocacy. It also improperly granted sovereign immunity to persons sued in their individual capacity. The Fifth Circuit's decision conflicts with the following cases:

Alden v. Maine, 527 U.S. 706 (1999) (cities and counties and their employees do not enjoy sovereign immunity, and even state employees do not enjoy sovereign immunity when sued in their individual capacities)

Buckley v. Fitzsimmons, 509 U.S. 259 (1993) (absolute immunity is presumed not to exist unless there is a historical basis for its existence related to the particular function; burden on defendant to overcome presumption)

Burns v. Reed, 500 U.S. 478 (1991) (only functions relating to "advocacy" qualify for prosecutorial immunity)

Gagan v. Norton, 35 F.3d 1473 (10th Cir. 1994) ("advocacy," not the office of the defendant, is the linchpin for prosecutorial immunity)

Houston v. Partee, 978 F.2d 362 (7th Cir. 1992) (presumption is that no prosecutorial immunity exists

until an indictment issues; burden on defendant to overcome presumption)

Kalina v. Fletcher, 522 U.S. 118 (1997) (no prosecutorial immunity for actions not involving advocacy)

United States v. Marion, 404 U.S. 307 (1971) (invocation of speedy trial rights does not require that an indictment issue, only that charges be pending from an arrest)

Finally, the issue of whether a plaintiff may recover money damages for violation of his rights to speedy trial under the Sixth Amendment has never been decided by this Court, but is an important question of Constitutional law that needs to be addressed.

I. The Fifth Circuit's ruling is in conflict with the other circuits and settled Supreme Court authority relating to qualified immunity because it engaged in an improper determination of factual issues on summary judgment instead of restricting its review to only questions of law as required by *Saucier v. Katz* and standard summary judgment practice.

A. General rules. Civil rights defendants are entitled to qualified immunity only if the conduct they are alleged to have undertaken did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). That

is, if from prior case law it would be clear to all reasonably competent officials that the alleged conduct was unlawful in the situation the defendant confronted, then qualified immunity may not be granted because the defendant had "fair warning" that such conduct was unconstitutional.

The proper method for analyzing a claim of qualified immunity was succinctly presented in *Saucier v. Katz*, 533 U.S. 194 (2001) and again in *Hope v. Pelzer*, 536 U.S. 730 (2002). The court is required to answer two questions – and only two questions – in a qualified immunity case, neither of which involve making any fact determinations or deciding reasonableness of conduct:

Prong 1. Does the plaintiff's complaint properly allege violation of a Constitutional right?[3]

Prong 2. Was the law, at the time of the official's conduct, clearly established enough to give the defendant "fair warning" that the conduct he is accused of taking violated Plaintiff's Constitutional rights?

Saucier, 533 U.S. at 201-03; *Hope*, 536 U.S. at 739-40. If these two questions are answered in the affirmative, then qualified immunity is not available to the defendant.[4] These two inquiries involve only

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[3] This is the same question addressed in a motion to dismiss under FRCP 12(b)(6).

[4] The *Saucier* analysis is the express statement of the two-prong inquiry first articulated in Justice Brennan's concurrence in *Harlow*, 457 U.S. at 820-21.

questions of law, not questions of fact, which is the only reason they may properly be decided in the context of a FRCP 12(b)(6) motion to dismiss or a FRCP 56 summary judgment proceeding.

B. The errors made by the Fifth Circuit are readily apparent. This Court's recent efforts to clarify the qualified immunity decision-making process have seemingly fallen on deaf ears in the Fifth Circuit. This is shown by the fact that the Fifth Circuit, as a matter of practice, completely ignores the proper methodology found in this Court's case law. Describing the unique and erroneous methodology it uses to determine qualified immunity, the Fifth Circuit said:

> *This circuit* has at times characterized its approach in qualified immunity cases as a three-pronged inquiry in which the traditional second prong is divided into two separate and distinct inquiries: whether the right was clearly established *and whether an officer's conduct was objectively reasonable.*

App. 10, n.2 (emphasis added). In other words, instead of only answering the two relevant questions of *law*, the Fifth Circuit believes it is allowed to answer a third question of *fact*, which it denominated a "sub-part" of prong two, call it "prong 2B":

Prong 2B: Was the defendant's *conduct* "objectively reasonable"?[5]

The Fifth Circuit erroneously believes if its prong 2B is answered in the affirmative, qualified immunity is proper.

Attempting to support its analysis, the court cited only to an earlier Fifth Circuit case, *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245 (5th Cir. 2005). However, *Atteberry* affirmed the district court's determination that qualified immunity should be denied because, *based on the state of the law* at the time the conduct occurred, people in defendants' position would have known the alleged conduct was unconstitutional. That is the correct analysis. *Atteberry* does not support the ruling below.

The Fifth Circuit's peculiar analysis can readily be shown to be incorrect. If the court rather than the jury is allowed to answer the question of whether the arrest was reasonable, then the jury would not be asked to answer that question as part of its charge. But according to the federal pattern jury charge, that is a principal jury question in a case alleging false arrest. See 3B Fed. Jury Prac. & Instr. §165.83 (5th ed.), pocket part (emphasis added):

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[5] See App. 10, n.2. While not applicable to the qualified immunity issues, the Fifth Circuit also incorrectly stated that Quinn did not produce any evidence of unconstitutional conduct. Actually, Quinn produced the *only* such evidence in the entire case: the affidavit of Melvin Tucker, App. 67-80.

§165.83. Special verdict form – False arrest and malicious prosecution.

SECTION I

1. Do you find defendant Jose Quiles liable for violating plaintiff John Quinn's constitutional right to be free from false arrest?

Answer: ____ Yes ____ No

If you have answered "Yes" to question 1, please proceed to question 2 below. If you answered "No" to question 1, then do not answer question 2.

2. Answer this question only if you answered "yes" to question 1: What amount do you award John Quinn as compensatory damages or nominal damages for the violation of his right under the U.S. Constitution to be free from false arrest?

Answer: $_____

Please proceed to Section II.

SECTION II (Only to be answered if you answered "Yes" to question 1 in Section I)

3. *Was it objectively reasonable for Jose Quiles to believe there was probable cause to arrest plaintiff John Quinn for the offense of aggravated sexual assault of a child?*

Answer: ____ Yes ____ No

Unless the pattern jury charge is in error (which it is not), then *the jury* is charged with answering the "objective reasonableness" question about Officer Quiles's conduct in question 3 above.[6] This is simply not a question the court has the Constitutional authority to answer.

The Fifth Circuit claims that its unique hybrid-fact/law inquiry into objective reasonableness is nothing more than "two sides of the same analytical coin." App. 10, n.2. This is likewise incorrect. As shown above, the proper legal inquiry for qualified immunity purposes does not consider whether the defendant's conduct was or was not factually or "objectively" reasonable. The *proper* inquiry for qualified immunity only asks whether the state of the law is such that an officer of reasonable competence would know that what the plaintiff has accused the defendant of doing is unconstitutional. Qualified immunity is all about fair warning gleaned from the current state of the law.[7]

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[6] The Fifth Circuit believes this is a question for the court to answer: "The district court held that a reasonable officer could have concluded that there was probable cause at the time that Quiles executed the probable cause affidavit . . . ". App. at 12. The pattern jury charge belies this methodology.

[7] "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. If on the other hand the law is clear, then the official cannot obtain qualified immunity.

Logically then, in order to answer the relevant question the court must determine what the state of the law is because only then may the court know whether the state of the law was clear enough to provide the defendant with fair warning that the alleged conduct was unconstitutional.

But the Fifth Circuit never considered the state of the law as to whether a police officer may constitutionally arrest someone based only on an uncorroborated outcry made by an informant of unknown reliability. Two cases cited to the court below, *Hale v. Fish*, 899 F.2d 390 (5th Cir. 1990), and *Ripson v. Alles*, 21 F.3d 805 (8th Cir. 1994), both hold that an arrest made under the precise conditions of this case is unconstitutional under the Fourth Amendment. In 2004, that had been the state of the law for at least fourteen years.

Because the Fifth Circuit strayed from the proper analysis for deciding a qualified immunity case, certiorari should be granted to correct this error and to prevent future courts from relying on the Quinn precedent and thereby make the same mistake.

C. A conflict among the circuits exists and certiorari is necessary to eliminate it. The Fifth Circuit's prong 2B question is found nowhere in the jurisprudence of this Court or in any other properly-decided immunity case law. The decision below thus creates a conflict among the circuits on the issue of whether "fair warning" is the correct prong 2 standard for qualified immunity.

Given the loyalty to this Court's qualified-immunity precedents found in every other circuit, if Quinn's case had been filed in any circuit but the Fifth, he would have won and not lost. That is because every other federal circuit court that has considered qualified immunity defenses since 2001 has utilized *Saucier*'s prong 2 "fair warning" standard and not the flawed, three-pronged test used by the Fifth Circuit below. See: *Suboh v. District Attorney's Office of Suffolk District*, 298 F.3d 81 (1st Cir. 2002); *Loria v. Gorman*, 306 F.3d 1271 (2nd Cir. 2002); *Farm Labor Organizing Committee v. Ohio State Highway Patrol*, 308 F.3d 523 (6th Cir. 2002); *Michael C. v. Gresbach*, 526 F.3d 1008 (7th Cir. 2008); *Shade v. City of Farmington*, 309 F.3d 1054 (8th Cir. 2002); *Wilkins v. DeReyes*, 528 F.3d 790 (10th Cir. 2008); *Kingsland v. City of Miami*, 382 F.3d 1220 (11th Cir. 2004). Indeed, the Fifth is the *only* circuit to employ the erroneous "prong 2B" analysis.

This Court has also faithfully applied the *Saucier* 2-prong analysis each time it has encountered a qualified immunity defense, deciding in each case:

> (1) whether the plaintiff had fulfilled prong 1 by pleading facts supporting a viable cause of action (e.g., cases decided based on prong 1 include: *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009); *Morse v. Frederick*, 551 U.S. 393 (2007); *Wilkie v. Robbins*, 551 U.S. 537 (2007); and *Scott v. Harris*, 550 U.S. 372 (2007)), or

> (2) whether the state of the law was sufficiently clear to have given the defendant "fair warning" that the conduct in issue was unconstitutional (e.g., cases decided based on prong 2 include: *Pearson v. Callahan*, 129 S.Ct. 808 (2009); *Brosseau v. Haugen*, 543 U.S. 194 (2004); and *Hope v. Pelzer*, 536 U.S. 730 (2002)).

Giving the Fifth Circuit the benefit of the doubt, perhaps the phrase "objectively reasonable" has itself somehow confused the court. If so, that confusion is unwarranted. This Court's pronouncement in *Crawford-El v. Britton*, 523 U.S. 574 (1998), settled the issue once and for all about the proper interplay of the term "objectively reasonable" and the state of the law. While *Crawford-El* used the phrase "conduct that was objectively reasonable," it did not mean the court should delve into the factual reasonableness of the conduct itself at the qualified immunity stage of the case. A more thoughtful analysis of *Crawford-El* bears this out:

> While there is obvious unfairness in imposing liability – indeed, even in compelling the defendant to bear the burdens of discovery and trial – for engaging in conduct that was objectively reasonable when it occurred, no such unfairness can be attributed to holding one accountable for actions that he or she knew, or should have known, violated the constitutional rights of the plaintiff. *Harlow* itself said as much: "If the law was clearly established, the immunity defense ordinarily should fail,

> since a reasonably competent public official should know the law governing his conduct." *Id.*, at 818-819, 102 S.Ct., at 2738; see also *Butz [v. Economou]*, 438 U.S. [478], at 506, 98 S.Ct., at 2911 [1978] ("[I]t is not unfair to hold liable the official who knows or should know he is acting outside the law . . . ").

Crawford-El, 523 U.S. at 588. More recently, in *Hope*, 536 U.S. at 741, this Court held (emphasis added):

> Accordingly, pursuant to *Lanier*, the salient question that the Court of Appeals ought to have asked is *whether the state of the law in 1995 gave respondents fair warning* that their alleged treatment of Hope was unconstitutional.

By definition, then, an officer can only act in an objectively reasonable manner if he does not or should not know that his conduct is unconstitutional based on present law. In other words, the defendant's alleged conduct can only be "objectively reasonable" *for qualified immunity purposes* if that conduct does not violate settled law. The converse is also true: a defendant acts in an objectively *un*reasonable manner for qualified immunity purposes if he violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457

U.S. at 818.[8] This concept is followed and applied in every circuit except the Fifth.

Qualified immunity depends on the state of the law, and if prior case law (or common sense)[9] gave the defendant fair warning that the subject conduct is unconstitutional, then qualified immunity is not available.

In our case, there are at least two prior, on-point cases holding that arresting someone based on the uncorroborated outcry of an informant of unknown reliability is unconstitutional (*Hale* and *Ripson*), so qualified immunity should have been denied to Officer Quiles because he had plenty of fair warning that his actions were unlawful. Indeed, the *Ripson* case could not be factually and legally more on point;

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[8] See also *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1343 (7th Cir. 1985): "The Supreme Court [in *Harlow*] spoke exclusively in terms of 'clearly established' law. This suggests that an official may escape liability for acts which could possibly be considered to violate a constitutional right if the right violated was not clearly established." And "clearly established" means (a) similar conduct has been found unlawful in a prior case, or (b) the conduct is so inherently outrageous that even without a prior case with similar facts the conduct would be known by all thinking people to be unreasonable and hence unlawful.

[9] An example of a "common sense" case might be one where welfare workers are accused of selling foster children into slavery. Just because no prior case law has found such conduct unlawful would be no reason to grant qualified immunity. Common sense supplements the federal reporters. *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990).

that case is virtually a mirror image of this one – except for the result – and thus presents a classic conflict between the circuits on this important issue.

Because it is based on fair warning, qualified immunity somewhat parallels what law school professors call the "first bite" rule. Government officials get a "bye" only when they are the first to engage in a particular form of conduct, but once that conduct is held to be unlawful, all *future* officials are now on notice and do not get qualified immunity if they engage in that same or similar conduct. This is the exact holding in *Harlow*:

> Reliance on the objective reasonableness of an official's conduct, *as measured by reference to clearly established law,* should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. *On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.* If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. . . . *If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.*

Harlow, 457 U.S. at 818-19 (emphasis added). *Harlow* could not be more clear: the issue in qualified immunity cases is the present "state of the law" and not whether a court believes the conduct at issue ultimately was or was not "reasonable" on the merits as the Fifth Circuit has opined.[10]

The Fifth Circuit never considered whether the state of the law was such that arresting someone based only on the uncorroborated outcry of an informant of unknown reliability violated the suspect's constitutional rights, so there is no way the Fifth Circuit could possibly have engaged in the proper qualified-immunity analysis – by definition. The Fifth Circuit not only ignored the correct 2-prong analysis by not considering the state of the law, but it substituted an improper, fact-based 3-pronged analysis and in doing so confounded the law of qualified immunity, placed itself in conflict with every

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[10] The Fifth Circuit's delineation of the inquiry as "objectively reasonable" (and thus, to its thinking, a question of law) rather than just "reasonable" (which all agree is a question of fact) does not hold water. *All* questions of reasonableness are based on an objective analysis, so the term "reasonable" means the same thing as "objectively reasonable." Adding the word "objectively" is superfluous and does not convert the inquiry from a factual question into a legal one by some sort of judicial alchemy as the Fifth Circuit apparently believes. Indeed, the federal pattern jury charge quoted above itself uses the term "objectively reasonable" as the third *jury* question asked in cases of this nature. If this is a legal question, why is the jury being asked to answer it?

other circuit and this Court's precedent, and improperly denied Mr. Quinn his day in court.

D. The state of the law is clear and negates the ruling below. Police officers hear stories every day in their jobs. But all competent officers know from the *Hale* and *Ripson* cases (and perhaps even from common sense) that an arrest based solely on the uncorroborated story of an informant of unknown reliability would not be an arrest based on probable cause and would thus violate the suspect's constitutional rights.

Defendant Quiles admitted that all he had to go on to suspect this crime had been committed was the uncorroborated story of an informant of unknown reliability, a story completely unsupported by any physical evidence.[11] He also admitted that hearing a story (even three different versions of the same story) may be enough for reasonable suspicion and thus trigger an investigation, but it does not provide probable cause sufficient to support an arrest.[12] Officer Quiles is not entitled to qualified immunity in these circumstances.

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[11] App. 53-54, 56-57, and 62-66.

[12] App. 53-54 and 62. Somehow, Officer Quiles then decided that hearing the same story a fourth time pushed him from reasonable suspicion to probable cause. A less logical analysis by a police officer is difficult to imagine. Even the Fifth Circuit was critical of Quiles on this point. App. 13-14.

Certiorari should be granted to correct the decision of the Fifth Circuit and to bring the Fifth Circuit back in line with all other circuits and the binding precedents of this Court.

II. The Fifth Circuit is in conflict with other circuits because it ignored the presumptions relating to prosecutorial immunity.

Here again, if Quinn's case had been brought in any circuit court other than the Fifth, the outcome below would have been the opposite of what occurred. This should not be permitted.

A. Advocacy is the linchpin of prosecutorial immunity. Settled law holds that prosecutors do not receive prosecutorial immunity unless they can show the conduct they are accused of involves "advocacy." *Briggs v. Goodwin*, 569 F.2d 10 (C.A.D.C.), *cert. denied*, 437 U.S. 904 (1978).[13] Said another way, prosecutorial immunity only exists when the functions under review are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430

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[13] The *Briggs* case is not factually on point, but it contains an in-depth, scholarly discussion of the history and basis for prosecutorial immunity, and the public-policy reasoning behind its implementation (or denial) in a particular case. *Briggs* compels a finding that the grant of prosecutorial immunity in this case is error. Because the decision below does not accord with the analysis in *Briggs*, a conflict in the circuits is present.

(1976). This rule was affirmed just last term in *Van de Kamp v. Goldstein*, 129 S.Ct. 855 (2009).[14]

Van de Kamp was recently cited by *Atherton v. District of Columbia Office of Mayor*, 567 F.3d 672 (C.A.D.C. 2009), a case in which the court refused to allow absolute immunity to the prosecutor because his role did not involve "advocatory functions" or "discretion" but rather only actions that "could have been performed by anyone." Accord: *Kalina v. Fletcher*, 522 U.S. 118 (1997) (no immunity for actions that do not require a prosecutor's legal skill or advocacy), and *Harlow*, 457 U.S. at 816-18 (distinguishing discretionary from ministerial functions, only the former of which qualify for immunity). In our case, dismissal of the charges against Quinn in

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[14] An additional reason to grant certiorari is because the Fifth Circuit read the *Van de Kamp* case far too broadly and other courts may do likewise. The Fifth Circuit apparently felt *Van de Kamp* changed the law such that *all* actions taken by prosecutors, even those not involving advocacy functions, now qualify for absolute immunity. But the actual holding in *Van de Kamp* is much more narrow. The defendant in that case received immunity because his actions in training prosecutors for courtroom work "necessarily require[d] legal knowledge and the exercise of related discretion" (*Van de Kamp*, 129 S.Ct. at 862) and because they were "directly connected with the prosecutor's basic trial advocacy duties" (*Id.* at 863). The Court also found it would be anomalous to hold that the person engaged in the courtroom work itself was immune but the person training them for that exact function would not be. *Van de Kamp* does not say that all conduct by prosecutors occurring outside the courtroom qualifies for immunity; the analysis still requires a functional approach – except in the Fifth Circuit.

compliance with the Texas speedy-trial statute likewise could have been performed by anyone in the prosecutor's office, such as a clerk, and did not involve discretion or advocatory functions but only ministerial action. The Fifth Circuit's ruling is thus in direct conflict with the holdings in *Atherton*, *Kalina*, and *Harlow*, and for that reason should be overturned.

B. The prosecutors did not overcome the "no immunity" presumption. This Court has always held very tightly to the rule that absolute immunity, such as prosecutorial immunity, is only available in those rare situations that were subject to an established immunity in 1871 when the civil rights act was passed. Indeed, this Court has gone so far as to hold that there is a double presumption *against* prosecutorial immunity, and the burden is on the defendant seeking such immunity to show two things: (a) that the type of conduct or function at issue was immune from liability in 1871, and (b) present-day public policy dictates that immunity should continue to shield that conduct from liability today.[15] *Buckley*, 509 U.S. at 269:

> Even when we can identify a common-law tradition of absolute immunity for a given function, we have considered 'whether §1983's history or purposes nonetheless

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[15] *Harlow*, 457 U.S. at 812: "The burden of justifying absolute immunity rests on the official asserting the claim."

> counsel against recognizing the same immunity in §1983 actions.' *Tower v. Glover*, 467 U.S. [914], at 920, 104 S.Ct., at 2825 [1984]. Not surprisingly, we have been 'quite sparing' in recognizing absolute immunity for state actors in this [§1983] context. *Forrester v. White*, 484 U.S. 219, 224, 108 S.Ct. 538, 542, 98 L.Ed.2d 555 (1988).

If the defendant does not prove both elements – historical basis and current policy – the ordinary presumption *against* absolute immunity controls.

Here, the Prosecutors not only did not meet their twin burdens above, they did not even attempt to do so. Nowhere in the Prosecutors' briefing did they argue – much less prove – that the conduct under review (i.e., disobeying statutory direction related to speedy trial) was immune from liability in 1871, nor did they make or cite the court to any arguments or case authority favoring the existence/continuation of such immunity under present-day public policy. Despite the Prosecutors' total failure to address and overcome this Court's no-immunity presumptions, the Fifth Circuit affirmed the trial court's grant of absolute immunity and thus erred.

Had the Prosecutors attempted to overcome the no-immunity presumption, they would have certainly failed. First, even without the impact of Texas Code of Criminal Procedure, art. 32.01, they waited more than a year after arrest to put the case to trial or even to seek an indictment so they are presumed to have violated the Constitution. *Doggett v. U.S.*, 505

U.S. 647, 652 n.1 (1992) (a post-accusation delay of one year is generally considered "presumptively prejudicial" and triggers speedy-trial issues). Second, it is inconceivable that any prosecutor ever had, or should have, immunity of any kind when he violates a controlling statute that requires him to take specific administrative action within a strictly-prescribed, inflexible length of time, a statute specifically designed to protect important Constitutional rights. The statute in question, Texas Code of Crim. Proc., art. 32.01, is the Texas version of the statute this Court indicated the states could pass in order to make more-certain the time frame within which a "speedy trial" must occur. *Barker v. Wingo*, 407 U.S. 514, 523 (1972). Unless the Court has withdrawn this invitation to the states, Quinn's Constitutional right to a speedy trial has been violated *as a matter of law*.

Having admitted to violating the speedy-trial statute, the Prosecutors were relegated to arguing "because we are prosecutors, we have immunity" and they made no effort whatsoever to support such a sweeping misconception. Indeed, that argument is foreclosed by this Court's well-settled case law which holds that immunity for prosecutors is based on the function they are performing, not on their job title.[16]

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[16] See *Imbler*, 424 U.S. at 431 ("We agree with the Court of Appeals that respondent's *activities* were intimately associated with the judicial phase of the criminal process, and thus were *functions* to which the reasons for absolute immunity apply with

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This rule controls everywhere except in the Fifth Circuit.

Because the Prosecutors did not overcome the no-immunity presumption or show that their actions involved advocacy, the decision of the Fifth Circuit must be reversed or this Court must abandon the no-immunity presumptions and the advocacy-only rule and replace them with alternative tests for the lower courts to use.

III. Certiorari should be granted to make clear that prosecutors may not ignore statutory law that expressly governs their conduct and still obtain prosecutorial or qualified immunity.

There are no cases directly on point for the assertion that prosecutors must obey on-point, controlling statutes (which, by definition, provide "fair warning" of their terms) in order to be entitled to immunity, but no other rule makes much sense.

Here, the Prosecutors do not dispute that by failing to dismiss the case or take it to the grand jury by the statutory deadline, they violated Texas Code of Crim. Proc., art. 32.01. Nor could they dispute it; violation of the statute is conclusively shown by resort to a calendar. By analogy, one prior case held

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full force") (emphasis added). See also, *Buckley*, 509 U.S. at 277; *Burns*, 500 U.S. at 486; and *Harlow*, 457 U.S. at 811, n.16 (no immunity for administrative tasks).

that when a prosecutor violated a court order his violation stripped him of *all* immunities. *White by Swafford v. Gerbitz*, 860 F.2d 661, 665 n.4 (6th Cir.), *cert. denied*, 489 U.S. 1028 (1989). It seems inconsistent at best to say a prosecutor forfeits his immunity by violating a court order containing arguably-ambiguous language like "immediately," but he may obtain immunity when he violates an unambiguous, controlling statute expressly designed to control his administrative functions.

IV. County employees sued in their individual capacities are not entitled to sovereign immunity because only State-government employees qualify for that form of immunity and then only when they are sued in their official capacity.

According to *Alden v. Maine*, city and county governments do not enjoy sovereign immunity, also sometimes called "Eleventh Amendment" immunity.

The Fifth Circuit, citing only to a footnote in another case out of that same circuit, held that if prosecutors are in the process of prosecuting state criminal laws, they are deemed "state actors" for purposes of sovereign immunity (citing to *Esteves v. Brock*, 106 F.3d 674 (5th Cir. 1997)). The problem with both the ruling below and the *Esteves* footnote is that they are directly contrary to the express holding of *Alden v. Maine* that "lesser entities" like cities and counties do not qualify for sovereign immunity, and

neither do *any* government employees sued in their individual capacity. Therefore, either *Alden v. Maine* must be overruled in favor of the *Esteves* rule, or the Fifth Circuit's decision below must be reversed; they may not logically co-exist.

There are at least three good reasons *Alden v. Maine* provides the better rule. First, it draws a bright line for the guidance of the lower courts as to who is entitled to sovereign immunity and who is not. No guessing is needed as to whether the defendant is pursuing a "state" function or a "county" function; the decision is controlled by who employs the defendant.

Second and perhaps more importantly, the *Alden v. Maine* rule is faithful to the text of the Eleventh Amendment itself, which clearly says that it applies only to "any suit in law or equity, commenced or prosecuted *against one of the United States*" (emphasis added).[17] Suits against county prosecutors are not suits "against one of the United States."

Third, there is no reason to extend sovereign immunity to county prosecutors even in their official capacities, since any recovery against them will not

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[17] Counsel is aware that state sovereign immunity is not technically "provided by" the Eleventh Amendment but is rather a common law immunity protected from the federal government's encroachment by that Amendment.

be paid out of the State's treasury – the main "harm" sought to be alleviated by sovereign immunity.[18]

Even if an "*Esteves* exception" might be adopted for the *Alden v. Maine* rule, that exception, at least as presently formulated by the Fifth Circuit, would still not apply in this case by its own terms. *Esteves* involved a county prosecutor exercising pre-emptory juror challenges while prosecuting a state felony charge in court, and prosecutorial immunity was granted to her based on the function being performed. Also, Brock was apparently being sued only in her official, not her individual, capacity. In addition, the dicta from *Esteves* cited by the Prosecutors below concerned only whether the county or the state would be responsible for any damages awarded, not whether the prosecutor herself was entitled to immunity.

In this case, the Prosecutors were not litigating criminal statutes in court, but were only dealing with issues of procedure (i.e., they were performing, or rather *not* performing, purely administrative functions). The Prosecutors have also been sued in their individual capacity so even if they are deemed "state employees," they are not entitled to sovereign immunity under *Alden* or *Esteves*.

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[18] It is uncontroverted that any damage award against the Prosecutors in this case will be paid from county resources, not those of the State of Texas.

Finally, by granting sovereign immunity to the Prosecutors in their individual capacities, the Fifth Circuit once again finds itself in direct conflict with nearly every other circuit, including the First,[19] Second,[20] Third,[21] Fourth,[22] Sixth,[23] Seventh,[24] Ninth,[25] Tenth,[26] and Eleventh.[27] The Supreme Court should not allow the Fifth Circuit to have its own "special" rules that only apply to cases filed in that circuit.

The traditional grounds for sovereign immunity are completely absent in this case. The Fifth Circuit's ruling granting sovereign immunity to the Prosecutors is in conflict with other circuits and with the precedents of this Court, and must therefore be corrected.

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[19] *Redondo-Borges v. U.S. Dep't of HUD*, 421 F.3d 1, 7 (1st Cir. 2005).

[20] *Liffiton v. Keuker*, 850 F.2d 73, 78 (2nd Cir. 1988).

[21] *Walker v. Zenk*, 2009 WL 886241 at *2 (3rd Cir. 2009).

[22] *South Carolina State Ports Auth. v. Federal Maritime Comm'n*, 243 F.3d 165, 177 (4th Cir. 2001).

[23] *Skinner v. Govorchin*, 463 F.3d 518, 524 (6th Cir. 2006).

[24] *Brokaw v. Mercer County*, 235 F.3d 1000, 1009 (7th Cir. 2000) (holding that when a state official is sued, the ordinary presumption that the suit is in an "official" capacity is negated when the defendants assert qualified immunity – a personal defense – as barring the case. The Prosecutors pleaded qualified immunity in this case).

[25] *Miranda v. Kitzhaber*, 328 F.3d 1181, 1190 (9th Cir. 2003).

[26] *Pleasant v. Lovell*, 876 F.2d 787, 793 (10th Cir. 1989).

[27] *Bolin v. Story*, 225 F.3d 1234, 1238 n. 4 (11th Cir. 2000).

V. Certiorari should be granted to clarify whether a §1983 plaintiff may recover money damages as a remedy for violation of his Sixth Amendment right to a speedy trial.

This presents a question of first impression. The lower courts found that because Quinn was not seeking reversal of a criminal conviction, he had not alleged a violation of the Sixth Amendment for which relief may be granted. To translate: according to the courts below, the only remedy available to a plaintiff for violation of his Constitutional rights to a speedy trial is reversal of a criminal conviction and a new trial.[28] This should not be the law.

Determining a violation of the right to speedy trial involves a balancing test of the following factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to speedy trial; and (4) *the prejudice to the defendant resulting from the delay*. *Barker v. Wingo*, 407 U.S. at 531. While this prejudice will often manifest itself in an unfair trial, there is no reason based on the text of the Sixth Amendment, the history or text of §1983, or any prior Supreme Court case law, to find that other remedies for this Constitutional violation should not be available.

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[28] App. 23, n.7.

Barker held that impairment of the criminal defense is only one of the distinct harms sought to be prevented by a speedy trial. "A fourth factor is prejudice to the defendant." See *Barker*, 407 U.S. at 532-33 (emphasis added):

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) *to minimize anxiety and concern of the accused*; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. . . . Finally, even if an accused is not incarcerated prior to trial, *he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility*.

Is any greater anxiety or hostility possible? Quinn was arrested on the charge of raping his own 8-year-old daughter – a crime arguably more infamous than murder, kidnaping, and treason combined. It was impossible for Quinn to obtain or keep gainful employment in any noble occupation while such charges were pending. Having those charges pending for nine months was bad enough, but to have them

pending *illegally* for an *additional* eight months[29] – when a controlling statute was supposed to prevent that from happening, when Quinn was constantly asking the Prosecutors to immediately bring the case to the grand jury so his name could be cleared, and when the Prosecutors had no basis to believe a crime had actually been committed – is unconscionable and should be actionable under §1983.

The express purpose of Texas Code Crim. Proc. art. 32.01 is to compel the state to either seek and obtain an indictment or release the defendant without undue delay in order to avoid violating the accused's rights to due process under the Fourteenth Amendment and rights to speedy trial under the Sixth Amendment. *State v. Meshell*, 23 S.W.3d 370 (Tex. App. – Houston [1st Dist.] 1999, no pet.). If prosecutors can violate it with impunity, the statute is a dead letter and so are the Sixth Amendment rights it is designed to protect.

The Fifth Circuit also held there is no speedy trial right unless the defendant is indicted.[30] This is

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[29] To calculate the deadline, the "terms" of the grand jury in Collin County are from January 1 to June 30, and from July 1 to December 31. A suspect arrested in September must therefore be brought to the grand jury no later than June 30 of the following year.

[30] The Fifth Circuit cited *United States v. MacDonald*, 435 U.S. 850 (1978), for its holding that an indictment must issue before a person may complain about a Sixth Amendment violation. However, Jeffrey MacDonald was seeking to invoke the Sixth Amendment before he was *arrested*, not just before he

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stunningly incorrect and is apparently another "rule" indigenous only to the Fifth Circuit. In discussing the rationale for the Sixth Amendment's speedy trial provision, the Court held in *United States v. Marion*, 404 U.S. 307, 320-21 (1971): "*Invocation of the speedy trial provision thus need not await indictment,* information, or other formal charge. . . . Until [arrest] occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer."[31]

Contrary to the holding of the Fifth Circuit below, the Sixth Amendment protects citizens at all

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was indicted, so *MacDonald* does not support the Fifth Circuit's reasoning. Posing yet another circuit conflict, the Sixth (*United States v. Watford*, 468 F.3d 891, 901 n.4 (6th Cir. 2006)) and Seventh (*United States v. Figueroa*, 228 Fed.Appx. 611, 613 (7th Cir. 2007)), cite to *MacDonald* for the opposite – and correct – holding in that case, namely that *arrest* triggers the Sixth Amendment.

[31] See also, *Doggett*, 505 U.S. at 648 ("In this case we consider whether the delay of 8½ years between petitioner's indictment and arrest violated his Sixth Amendment right to a speedy trial. We hold that it did"). The Fifth Circuit once again finds itself not only in conflict with this Court's settled law, but also with the other circuits on this point. See, *United States v. Jenkins-Watts*, ___ F.3d ___, 2009 WL 2366404, *12 (8th Cir. 2009) ("The Sixth Amendment right attaches at the time of arrest or indictment, whichever occurs first"); *United States v. DeGrasse*, 258 Fed.Appx. 485, 487 n.2 (3rd Cir. 2007) (same); and *United States v. Knight*, 562 F.3d 1314, 1323 (11th Cir. 2009) (same; ironically citing a Fifth Circuit case as authority, *United States v. Walters*, 591 F.2d 1195 (5th Cir. 1979)).

times post-arrest through judgment. But such "protection" will often be illusory if a violation of the right can only be addressed by reversal of a conviction. Such a rule would not address any situation in which a conviction does not occur. Does the existence of a defendant's Constitutional right to a speedy trial really depend on whether the state has a case strong enough to win – the weaker the state's case, the lesser the defendant's Constitutional rights? If so, that seems perplexingly counter-intuitive.

The question posed is: may Quinn recover money damages as a remedy under §1983, or is reversal of a criminal conviction the only remedy he has for violation of his right to speedy trial? This is a question of first impression.[32]

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[32] However, see *Blake v. Katter*, 693 F.2d 677 (7th Cir. 1982), *overruled o.g., Wilson v. Garcia*, 471 U.S. 261 (1985), which suggested that money damages may be recoverable as a remedy for violation of the Sixth Amendment's speedy trial guaranty (suggested because the court allowed that claim to go forward being litigated only by Blake's widow, who could only have been seeking money damages as a remedy). We found no Supreme Court cases directly on point where such damages have been awarded, nor did we find any where they were sought but denied. *Strunk v. U.S.*, 412 U.S. 434 (1973) is sometimes cited as a case holding that dismissal of the charges is the "only" remedy for violation of the Sixth Amendment, but that case merely held that *reduction in sentence*, in lieu of complete dismissal, was not an available remedy for a Sixth Amendment violation; it did not hold that money damages may never be considered as a remedy under §1983 because that issue was not litigated in that case. *Id.*, 412 U.S. at 437.

Because the Sixth Amendment is triggered at the time of arrest, if this Court decides money damages is a proper remedy, then Quinn has set forth a viable claim for violation of the Sixth Amendment and thus a claim under §1983. The Fifth Circuit's dismissal of those claims under prong 1 of the qualified immunity analysis would then be an error that should be corrected.

CONCLUSION

"I heard a story – you're under arrest."

Those words do not fulfill the stringent Constitutional requirement known as "probable cause." Yet, those words precisely sum up what happened to Mr. Quinn in September 2004. Admittedly acting on nothing more than the long-delayed, uncorroborated outcry of an informant of unknown reliability made during a time of great personal stress, the police had Mr. Quinn arrested for the most heinous crime a man can be accused of: raping his own child. When sued, the police officer is then given qualified immunity because *the court* – not the jury – believes the officer when he said he "thought" he had probable cause to arrest, the court refuses to "second guess" the officer's assertion in that regard, the court disregards the expert opinion of a renowned police-procedures expert, and the court ignores the state of the law, the clear precedents of this Court, and the rulings of all

other circuit courts. Clearly a bad day for Mr. Quinn – but an even worse day for the rule of law.

Tragically, the story does not end there. After his illegal arrest, the charges against Mr. Quinn were allowed to remain pending illegally for an additional eight months despite the existence of an on-point statute that expressly required the prosecutors to either dismiss the charges or take them to a grand jury within eight months and 26 days of the arrest. But for his successful habeas corpus action, Mr. Quinn might remain under arrest in Collin County, Texas – with these horrific, life-altering charges still pending against him – to this very day.

His reputation scourged, his pocketbook drained of $40,000 in defense costs, his livelihood destroyed, and his psyche permanently scarred by the police and the prosecutors, Mr. Quinn filed suit under 42 U.S.C. §1983 to remedy the wrongs done to him. But the courts below were not open to hear Mr. Quinn's plea for justice. Instead, they ignored and twisted immunity laws to achieve what seems to have been a pre-determined outcome unique to cases that happen to be filed in the Fifth Circuit. The police officer who admittedly did not have probable cause to arrest, and the prosecutors who admittedly violated the Texas speedy-indictment statute, both walk away with no consequences for conduct they concede was unconstitutional. If this is the law, then there is something terribly, terribly wrong. Fortunately, it is not.

The law presently found in the settled jurisprudence of this Court, and in the precedents of all other circuits, fully justifies – even compels – reversal of the Fifth Circuit's decision. The errors below are numerous, deep-seated, and should not be allowed to stand.

Mr. Quinn respectfully asks this Honorable Court to issue a writ of certiorari so the decisions below may be corrected, for Mr. Quinn's sake, for the sake of consistency and uniformity among the circuits, and in order to ensure that such ill-advised rulings are not perpetuated.

Respectfully submitted,

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2009 WL 1181072

United States Court of Appeals,
Fifth Circuit.
John QUINN, Plaintiff-Appellant
v.
John ROACH, individually and in his official capacity as Collin Co District Attorney; Gail Leyko, individually and in official capacity as Collin Co Assistant District Attorney; Manuel Gonzales, individually and in official capacity as Collin Co Assistant District Attorney; Curtis Howard, individually and in official capacity as Collin Co Assistant District Attorney; Kristi Tyler, individually and in official capacity as Collin Co Assistant District Attorney; Michelle Voirin, individually and in official capacity as Collin Co Assistant District Attorney; Jose Quiles, individually and in official capacity as McKinney Texas police officer; John Does, 1-5 Defendants, individually and in their official capacity as McKinney Texas police officers; Laurie Houston; Katie Quinn; Collin County Texas; City of McKinney, Defendants-Appellees.
No. 08-40633.

May 4, 2009.

James A. Pikl, McKinney, TX, for Plaintiff-Appellant.

Robert Jacob Davis, Matthews, Stein, Shields, Pearce, Knott, Eden & Davis, John Francis Roehm, III, Fanning, Harper & Martinson, Dallas, TX, for Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas, USDC No. 4:06-CV-120.

Before JONES, Chief Judge, and WIENER and BENAVIDES, Circuit Judges.

FORTUNATO P. BENAVIDES, Circuit Judge:*

This civil suit stems from the arrest of the plaintiff-appellant, John Quinn ("Quinn"), for the alleged sexual assault of his daughter, Katie Quinn, when she was a young child, and the subsequent fifteen-month delay in the presentation of his criminal case to the grand jury. Quinn filed suit against Collin County, Texas; the Collin County District Attorney and a number of assistant district attorneys (together, "the District Attorney Defendants"); the City of McKinney, Texas; and the city police officer who secured the arrest warrant, Detective Jose Quiles.[1]

The claims in this case can be divided into two groups: (1) those dealing with the initial arrest; and (2) those dealing with the subsequent fifteen-month delay in the presentation of the case to the grand jury. Quinn's claims against Detective Quiles and the City (together, the "City Defendants") relate to the

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] Quinn also filed suit against his ex-wife, Laurie Houston, and Katie Quinn. Those claims are not at issue in this appeal.

procurement of the arrest warrant. Quinn sued Quiles and the City under 42 U.S.C. § 1983 for violating Quinn's right to be free from unreasonable seizures under the Fourth Amendment and right to due process and equal protection under the Fifth and Fourteenth Amendments, for malicious prosecution under state and federal law, and for false arrest and imprisonment and various forms of negligence under state law. Quinn's claims against Collin County, the Collin County District Attorney, and the assistant district attorneys (together, "the County Defendants") relate to the fifteen-month delay in the presentation of his case to the grand jury. Quinn sued the County Defendants under § 1983 for violating his right to a speedy trial under the Sixth Amendment and his right to due process under the Fifth and Fourteenth Amendments, and for negligence under state law. Quinn sought money damages against all of the defendants-appellees, as well as injunctive relief against the County Defendants.

Both the County Defendants and the City Defendants filed motions to dismiss all claims under Fed.R.Civ.P. 12(b)(6), and Detective Quiles also filed a motion for summary judgment on all claims against him. With regard to Quinn's claims relating to the procurement of the arrest warrant, the district court held: (1) that he had failed to state an equal protection claim because he was not a member of a protected class; (2) that he had failed to state a claim for malicious prosecution under federal law because no such freestanding claim exists; (3) that any

federal-law claims against Quiles in his official capacity were duplicative of the federal-law claims against the City and should therefore be dismissed; (4) that Quinn had failed to state a claim against Quiles in his official capacity under state law because any such claims were barred by sovereign immunity; (5) that he had failed to state a claim against the City for negligence because such a claim was barred by sovereign immunity; (6) that Quiles was entitled to summary judgment on the issue of qualified immunity from Quinn's claims under § 1983 on the grounds that Quiles's determination of probable cause was objectively reasonable and Quinn was not deprived of any procedural due process rights; and (7) that Quiles was entitled to summary judgment on the issue of official immunity from Quinn's state-law claims because Quiles's actions in procuring the arrest warrant were discretionary, made in good faith, and made within the scope of his authority.

The district court dismissed all of Quinn's claims relating to the fifteen-month delay in the presentation of his case to the grand jury, holding: (1) that the delay did not violate any of Quinn's constitutional rights; (2) that the District Attorney Defendants were protected by qualified immunity and prosecutorial immunity from being sued in their individual capacities, and by Eleventh Amendment immunity from being sued in their official capacities, for their actions in handling the criminal case against Quinn; (3) that Quinn had failed to allege the existence of an "official policy" that could subject the County to

liability under § 1983; and (4) that Quinn lacked standing to seek injunctive relief because he had failed to allege a likelihood of a future violation of his rights.

Quinn appeals the district court's holdings that Quiles enjoyed qualified and official immunity; that there is no federal cause of action for malicious prosecution; that the City enjoyed sovereign immunity; that the fifteen-month delay did not violate Quinn's constitutional rights; that the District Attorney Defendants enjoyed qualified, prosecutorial, and Eleventh Amendment immunity; and that Quinn did not have standing to pursue injunctive relief.

For the reasons stated below, we AFFIRM.

I. Background

Quinn and his former wife, Laurie Houston, divorced in 1991. Quinn was awarded custody of their two children, but one of them, Quinn's daughter Katie, went to live with Houston at some point. On July 15, 2004, Katie, who was sixteen at the time, told her mother that Quinn had been sexually abusing her since she was eight years old. Earlier that day, Katie had been arrested for shoplifting, and Katie and her mother were discussing Katie's arrest when Katie stated that she had been abused by Quinn. During that conversation, Katie attempted suicide, and she was taken to the hospital. At the hospital, Joy Turner, a nurse, performed an admission assessment on Katie. During the assessment,

Katie stated that Quinn had sexually abused her beginning when she was eight years old and ending when she was twelve. Turner reported the allegations of abuse to the Texas Department of Family and Protective Services, Child Protective Services Division ("CPS"). On July 21, 2004, Dawn Todd of the Denton County Children's Advocacy Center conducted a videotaped interview with Katie. In the interview, Katie stated that her father had engaged in sexual intercourse with her on two separate occasions, once when she was eight years old and once when she was nine or ten years old.

On July 30, 2004, Detective Quiles received a written notification of the alleged abuse from CPS (the "CPS intake report") and a copy of the videotaped interview conducted by Todd. Quiles viewed the videotape of the interview on August 9, 2004. On August 12, Laurie Houston met with Quiles and provided Quiles with a written statement regarding the events of July 15, 2004, including Katie's claim that Quinn had been sexually abusing her since she was eight years old. Houston also stated that Quinn was an alcoholic and a flight and suicide risk. On the same date, Quiles asked Houston to provide him with a copy of Katie's medical records. On August 31, 2004, Beth Hudson, a registered nurse, performed a Sexual Assault Nurse Examiner ("SANE") examination on Katie. On September 2, 2004, Quiles received an affidavit from Joy Turner, the nurse who had performed the admission assessment on Katie at the

hospital, recounting Katie's statements to her that her father had abused her from ages eight to twelve.

Based on the videotaped interview of Katie, Turner's affidavit, Houston's written and oral statements, and the CPS intake report, Quiles executed a probable cause affidavit on September 8, 2004 for Quinn's arrest. The next day, a warrant was issued for Quinn's arrest for the felony criminal offense of aggravated sexual assault of a child. Quinn was arrested by the McKinney Police Department on September 12, 2004. Quiles was not present at the arrest. Quiles was not aware of the results of the SANE examination until after Quinn's arrest. The examination revealed that Katie had a hymen tear, indicating some form of physical trauma. The report did not indicate the cause of the tear or when it had occurred.

Quinn filed a writ of habeas corpus in state court seeking release from bail because of delay, and on January 6, 2006 a state district court judge granted the writ and issued an order of dismissal. The matter was then presented to the Collin County Grand Jury, which no billed Quinn on January 10, 2006.

II. Standard of Review

This court reviews a district court's grant of summary judgment de novo, applying the same standards as the district court. *See XL Specialty Ins. Co. v. Kiewit Offshore Services, Ltd.*, 513 F.3d 146, 149 (5th Cir.2008); *Hirras v. Nat'l R.R. Passenger Corp.*, 95

F.3d 396, 399 (5th Cir.1996). Summary judgment is proper if the record reflects "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

This court also reviews de novo a district court's grant or denial of a Rule 12(b)(6) motion to dismiss, *Frank v. Delta Airlines, Inc.*, 314 F.3d 195, 197 (5th Cir.2002), "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff," *Stokes v. Gann*, 498 F.3d 483, 484 (5th Cir.2007). Dismissal is appropriate when the plaintiff has not alleged "enough facts to state a claim to relief that is plausible on its face" and has failed to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 500 U.S. 544, 555, 570 (2007).

III. Claims Relating to Quinn's Arrest

A. Qualified Immunity

The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court mandated a two-step sequence for resolving government officials' qualified immunity claims: first, a court must decide whether the facts alleged or shown are sufficient to make out a violation of a constitutional

right; second, the court must decide whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Id.* at 201. If the official's conduct violated a clearly established constitutional right, then qualified immunity is not applicable. Prior to *Saucier,* the Court had merely suggested that "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all." *County of Sacramento v. Lewis,* 523 U.S. 833, 841 n.5 (1998). *Saucier* made clear that these two steps were sequential and that a court may not skip the first step and proceed directly to the second step. *See Saucier,* 533 U.S. at 201. In a very recent decision, the Court rejected the rigid sequential approach set out in *Saucier.* In *Pearson v. Callahan,* 129 S.Ct. 808 (2009), the Court held that "while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory," and that judges "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 818.

Quinn contends that the district court did not apply the correct legal standard for qualified immunity in this case because the district court inquired into the objective reasonableness of Quiles's actions. This argument is wholly without merit, as "[t]he relevant, dispositive inquiry in determining

whether a right is clearly established [under the second step of the qualified immunity inquiry] is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[2] *Saucier,* 533 U.S. at 202.

The district court held that Quinn had adequately alleged a violation of his Fourth, Fifth, and Fourteenth Amendment rights, but that Quiles's belief that his conduct in procuring the warrant was lawful was objectively reasonable. The issue is

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[2] This circuit has at times characterized its approach in qualified immunity cases as a three-pronged inquiry in which the traditional second prong is divided into two separate and distinct inquiries: whether the right was clearly established and whether an officer's conduct was objectively reasonable. *See, e.g., Hare v. City of Corinth, Miss.*, 135 F.3d 320, 326 (5th Cir.1998) ("The second prong of the qualified immunity test is better understood as two separate inquiries: whether the allegedly violated constitutional rights were clearly established at the time of the incident; and, if so, whether the conduct of the defendants was objectively unreasonable in the light of that then clearly established law."); *Brown v. Bryan County, Okl.*, 67 F.3d 1174, 1181 (5th Cir.1995) ("A proper analysis of a qualified immunity defense requires us to conduct a two (sometimes three) prong inquiry."), *vacated on other grounds*, 520 U.S. 397 (1997). The Supreme Court's recent case law makes it clear that these inquiries are more appropriately viewed not as separate and distinct, but as two sides of the same analytical coin. *See Pearson*, 129 S.Ct. at 818; *Saucier*, 533 U.S. at 202; *see also Conroe Creosoting Co. v. Montgomery County, Tex.*, 249 F.3d 337, 340 (5th Cir.2001) ("Second, we determine whether the constitutional right was clearly established at the time the defendant acted. A constitutional right is 'clearly established' if 'the unlawfulness of the conduct would be apparent to a reasonably competent official.' ").

whether the district court was correct that Quinn failed to raise a fact issue as to the objective reasonableness of Quiles's belief that his conduct was lawful. In the qualified immunity context, the objective reasonableness of an officer's belief that his conduct was lawful is a question of law, not fact. *See Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 256 (5th Cir.2005).

Quinn argues that Quiles's procurement of the arrest warrant violated clearly established law that making an arrest without probable cause violates the Fourth Amendment and that engaging in judicial deception when applying for a warrant violates the Fifth and Fourteenth Amendments. In other words, Quinn contends that it would be clear to a reasonable officer that swearing out a probable cause affidavit based on the evidence available in this case on September 8, 2004, and providing the supporting evidence to the magistrate that was in fact provided by Quiles, violated Quinn's right under the Fourth Amendment to be free from arrest in the absence of probable cause and his right under the Fifth and Fourteenth Amendments to be free from the use of judicial deception in the procurement of warrants.

The Fourth Amendment requires that an officer have probable cause for an arrest. Probable cause exists "when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *Glenn v. City of Tyler,*

242 F.3d 307, 313 (5th Cir.2001) (citation and internal quotation marks omitted). A police officer is entitled to qualified immunity for an arrest if a reasonable person in the officer's position could have believed he had probable cause to arrest. *Id.* The district court held that a reasonable officer could have concluded that there was probable cause at the time that Quiles executed the probable cause affidavit based on the videotaped interview of Katie, Turner's affidavit, Houston's written and oral statements, and the CPS intake report. Quinn argues that a reasonable officer could not have concluded that there was probable cause based on the available evidence because the evidence cited by Quiles and the district court consisted solely of Katie's uncorroborated allegations of abuse; the allegations differed in detail when they were made to different individuals; the allegations were made by a teenager of unknown reliability during a time of great stress; Quiles did not attempt to get Quinn's side of the story; and Quiles never talked directly to Katie about the allegations.[3]

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[3] Quinn heavily relies on an affidavit from a purported police procedures expert stating that the available evidence was insufficient to give an objectively reasonable officer the level of proof necessary to conclude that Quinn had committed a crime. Quinn asserts that this affidavit is sufficient to raise a fact issue as to objective reasonableness. However, as noted by the district court, "this court has repeatedly held that objective reasonableness in a qualified immunity context is a question of law for the court to decide, not an issue of fact." *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 256 (5th Cir.2005) (citations omitted). Quinn also asserts that Quiles himself conceded in his

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Although the facts known to Quiles at the time of the arrest did raise some questions about the Katie's reliability, which Quiles did not pursue, these questions were not so significant as to have made it objectively unreasonable for Quiles to have believed that probable cause existed in light of the detailed nature of Katie's allegations and the fact that Quiles did not possess evidence at the time that Katie may have had a motive to fabricate the allegations. *See Illinois v. Gates,* 462 U.S. 213, 234 (1983) ("[E]ven if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case."); *United States v. Phillips,* 727 F.2d 392, 399 (5th Cir.1984) (holding that detailed nature of informant's statement could compensate for uncertainty regarding the informant's veracity). The inconsistencies in Katie's descriptions of the timing of the abuse are relatively minor; her attempted suicide is not

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deposition that Quiles only had reasonable suspicion that Quinn had sexually assaulted his daughter, not probable cause, and that this is sufficient to raise a fact issue as to objective reasonableness. However, Quiles's statement in his deposition that he had reasonable suspicion referred to the period immediately after he first reviewed the CPS intake report, before he had reviewed the videotaped interview of Katie and received Turner's affidavit and Laurie Houston's written and oral statements. Quiles has consistently stated that he believed that he had probable cause at the time he executed the probable cause affidavit.

necessarily indicative of a lack of reliability, and may in fact be viewed as supporting her allegations of abuse; and shoplifting is a relatively minor crime that does not provide particularly strong evidence that a person is generally untrustworthy. Katie's vested interest in the child support dispute between Quinn and Laurie Houston raises a more serious question about her reliability, but there is no evidence that Quiles was aware of the dispute at the time of the arrest. There is no evidence that Quinn disregarded any exculpatory evidence at the time of the arrest. *See Wadkins v. Arnold,* 214 F.3d 535, 541 (4th Cir.2000) ("Although an officer may not disregard readily available exculpatory evidence of which he is aware, the failure to pursue a potentially exculpatory lead is not sufficient to negate probable cause."); *see also Evett v. DETNTFF,* 330 F.3d 681, 688 (5th Cir.2003) (quoting *Bigford v. Taylor,* 834 F.2d 1213, 1218 (5th Cir.1988)) ("[W]hile law enforcement personnel 'may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause.'"). Further investigation into Katie's reliability may have been advisable as a matter of good police practices, but it was not objectively unreasonable to believe that probable cause existed even in the presence of some questions about Katie's reliability.[4]

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[4] Quiles asserts that he did not interview Quinn because Laurie Houston had informed him that Quinn was an alcoholic and a flight or suicide risk, and that he did not interview Katie

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Quinn argues that this case is similar to *Ripson v. Alles*, 21 F.3d 805 (8th Cir.1994), in which the court held that a police officer was not entitled to qualified immunity for his arrest of a parent who had allegedly sexually abused his two-year-old daughter. In *Ripson*, the officer arrested the child's father based on statements by the child's mother that the child had signs of redness in her genital area after visiting her father and claimed that her father had touched her inappropriately, as well as a statement by the mother's live-in boyfriend corroborating the mother's statement that the child claimed that her father had touched her inappropriately. *Id.* at 808. It was undisputed that, at the time of the arrest, the officer knew that there was no medical evidence of abuse and that the child's parents were involved in a custody dispute over the child. *Id.* The county attorney had also advised the officer to "keep investigating." *Id.* The court held that "[b]ased on all of the facts and circumstances within [the officer's] knowledge and of which he had reasonably trustworthy information at the time of the arrest, a reasonable officer could not have believed probable cause existed

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because he was concerned about causing her additional trauma. We do not find these explanations to be particularly satisfying, as they appear to be based on largely unsupported speculation, and there were presumably ways of interviewing Quinn and Katie while being sensitive to these concerns. However, we do not believe that it was objectively unreasonable to believe that probable cause existed without interviewing Quiles and Houston, regardless of the reason that Quiles did not interview them.

for the arrest of [the father] for sexually abusing his daughter." *Id.*

Quinn contends that this case is similar to *Ripson* in that there was no physical evidence of abuse or other evidence to corroborate the allegation of abuse, and asserts that the case for probable cause was actually stronger in *Ripson* because the allegations in that case were made contemporaneously with the abuse. There are clearly some factual similarities between this case and *Ripson,* but *Ripson* is distinguishable on a number of different grounds. First, the lack of corroborating physical evidence in this case is not as suspicious because the alleged abuse occurred a number of years prior to the investigation and Katie had been sexually active since the alleged abuse. Second, the allegations of abuse in this case were made by the alleged victim herself, not simply by her mother. Third, there is no evidence that Quiles was aware of the legal dispute between Quinn and Laurie Houston over child support, whereas in *Ripson* the officer was aware of the custody dispute. Considered as a whole, the facts in *Ripson* that tended to cast doubt on the veracity of the allegations of abuse and that were known to the officer at the time of the arrest appear more significant than those known to Quiles.

Quinn also argues that Quiles's belief that he fully disclosed all relevant facts and did not withhold exculpatory evidence from the magistrate judge that issued the warrant was not objectively reasonable. Quiles testified that he submitted all of the evidence

that he had collected in this case to the magistrate judge. Quinn has failed to present any competent summary judgment evidence that Quiles withheld relevant evidence from the magistrate judge; Quinn simply speculates that Quiles was aware of various facts bearing on Katie's credibility, including that she was seeing a psychiatrist and had attempted suicide on numerous occasions, because Laurie Houston was aware of them and she had been interviewed by Quiles. *See Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.1994) (stating that unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence). Based on the record evidence, Quiles's belief that he fully disclosed all relevant facts and did not withhold exculpatory evidence from the magistrate judge was objectively reasonable.[5]

We agree with the district court that Quinn failed to raise a fact issue as to the objective reasonableness of Quiles's belief that his conduct was lawful.

B. Official Immunity

Under Texas law, official immunity protects individual public officials from suit arising from

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[5] For the same reasons discussed above, Quiles did not violate Quinn's clearly established substantive due process rights. *See Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (stating that conduct must be "conscience shocking" to violate substantive due process).

performance of (1) discretionary duties (2) in good faith (3) within the scope of their authority. *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 422 (Tex.2004) (citing *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex.1994)). Quinn concedes that Quiles was acting within the scope of his authority as a McKinney police officer when he applied for the arrest warrant, but argues that Quiles was not engaged in a discretionary function and that Quinn has raised a fact issue as to whether Quiles acted in good faith.

"If an action involves personal deliberation, decision and judgment, it is discretionary; actions which require obedience to orders or the performance of a duty to which the actor has no choice, are ministerial." *Chambers*, 883 S.W.2d at 654. "Ministerial acts are those for which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Ballantyne*, 144 S.W.3d at 425 (citation and internal quotations omitted). The Texas Supreme Court has held that the actions of a police officer during a high-speed chase are discretionary because "[t]he decision to pursue a particular suspect will fundamentally involve the officer's discretion, because the officer must, in the first instance, elect whether to undertake pursuit," and that "[b]eyond the initial decision to engage in the chase, a high speed pursuit involves the officer's discretion on a number of levels, including, which route should be followed, at what speed, should back-up be called for,

and how closely should the fleeing vehicle be pursued." *Chambers,* 883 S.W.2d at 655. A number of Texas appellate courts have held that a police officer's investigation of a crime, determination of probable cause, and decision concerning if and when to make an arrest, are discretionary functions. *See, e.g., Kersey v. Wilson,* 69 S.W.3d 794, 799 (Tex.App. – Fort Worth 2002, no pet.); *Davis v. Klevenhagen,* 971 S.W.2d 111, 117-18 (Tex. App. – Houston [14th Dist.] 1998, no pet.); *Zess v. Funke,* 956 S.W.2d 92, 94 (Tex.App. – San Antonio 1997, no writ); *Antu v. Eddy,* 914 S.W.2d 166, 171 (Tex.App. – San Antonio 1995, no writ); *City of Hempstead v. Kmiec,* 902 S.W.2d 118, 121 (Tex.App. – Houston [1st Dist.] 1995, no writ); *Chapman v. Gonzalez,* 824 S.W.2d 685, 687 (Tex.App. – Houston [14th Dist.] 1992, writ denied); *Dent v. City of Dallas,* 729 S.W.2d 114, 116 (Tex.App. – Dallas 1986, writ refused n.r.e.). Quiles was clearly performing a discretionary function for the purposes of official immunity under Texas law when he investigated the alleged abuse and executed the probable cause affidavit.[6]

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[6] Quinn cites *Welch v. Milton,* 185 S.W.3d 586 (Tex.App. – Dallas 2006, pet. denied) for the proposition that, the immunity context, "[d]iscretionary acts are those related to determining what the policy of the governmental unit will be, but do not extend to the carrying out of the specifics of particular policies or exercise of 'professional' or 'occupational' discretion." *Id.* at 597 (citation and internal quotation marks omitted). That proposition is plainly at odds with the rule announced by the Texas Supreme Court that, in the official immunity context,

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To determine whether a public official acted in good faith, a court should consider whether a reasonably prudent official, under the same or similar circumstances, could have believed that his conduct was justified based on the information he possessed when the conduct occurred. *See Ballantyne,* 144 S.W.3d at 426. This test is derived substantially from the federal qualified immunity test. For the same reasons that we hold that Quiles held an objectively reasonable belief that his conduct was lawful, we hold that Quiles acted in good faith for the purposes of the official immunity inquiry.

We agree with the district court that Quiles was protected by official immunity.

C. Malicious Prosecution

Quinn asserts that the district court erred in holding that there is no freestanding federal cause of action for malicious prosecution. The district court's holding is clearly supported by this court's decision in *Castellano v. Fragozo,* 352 F.3d 939, 945 (5th Cir.2003) (holding that "no such freestanding constitutional right to be free from malicious prosecution exists").

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discretionary actions are those that involve personal deliberation, decision and judgment. *See Chambers,* 883 S.W.2d at 654.

D. Sovereign Immunity

Quinn asserts that the district court erred in holding that Quinn had failed to state a claim against the City for negligence because such a claim was barred by sovereign immunity. Under Texas law, the City of McKinney, as a unit of state government, is immune from suit and liability except to the extent that there is a waiver of immunity. *See Dallas Area Rapid Transit v. Whitley,* 104 S.W.3d 540, 542 (Tex.2003). As the district court held, Quinn's negligence allegations do not fall within the waiver of sovereign immunity for certain tort claims outlined in the Texas Tort Claims Act. *See Perez v. City of Dallas,* 180 S.W.3d 906, 910 (Tex.App. – Dallas 2005, no pet.) (citing Tex. Civ. Prac. & Rem.Code §§ 101.021, 101.022).

IV. Claims Relating to the Fifteen-Month Delay

A. Whether the Delay Violated Quinn's Constitutional Rights

Quinn asserts that the district court erred in holding that the fifteen-month delay did not violate his right to a speedy trial under the Sixth Amendment or his right to due process under the Fifth and Fourteenth Amendments.

1. Speedy Trial Claim

The district court held that the fifteen-month delay did not violate Quinn's right to a speedy trial under the Sixth Amendment on the grounds that pre-indictment delay does not give rise to a speedy trial claim. Quinn asserts that this was error because the protection afforded by the Sixth Amendment attaches upon arrest, not only indictment.

The Sixth Amendment protects the right of "the accused . . . to a speedy and public trial." U.S. Const. amend. VI. This protection "attaches at the time of arrest or indictment, whichever comes first." *Nelson v. Hargett,* 989 F.2d 847, 851 (5th Cir.1993); *see also United States v. MacDonald,* 456 U.S. 1, 7 (1982) (citing *Dillingham v. United States,* 423 U.S. 64 (1975)) ("[T]he period between arrest and indictment must be considered in evaluating a Speedy Trial Clause claim."). Speedy-trial claims are evaluated using a two-step process. At the first step, a court examines the length of the delay, which is "to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker v. Wingo,* 407 U.S. 514, 530 (1972). "A delay of less than one year will rarely qualify as 'presumptively prejudicial' for purposes of triggering the *Barker* inquiry." *Cowart v. Hargett,* 16 F.3d 642, 646 (5th Cir.1994). If the delay raises a presumption of prejudice, a court moves to the second step, at which "the length of the delay, the reason for the delay, and defendant's diligence in asserting his

or her rights is weighed against the prejudice to the defendant." *United States v. Bergfeld,* 280 F.3d 486, 488 (5th Cir.2002).

The only remedy for a violation of the Sixth Amendment right to a speedy trial is dismissal of any criminal charges. *See United States v. MacDonald,* 435 U.S. 850, 861 n.7 (1978) (citing *Strunk v. United States,* 412 U.S. 434 (1973)) ("[T]his Court has held dismissal of the indictment to be the proper remedy when the Sixth Amendment right to a speedy trial has been violated."). Here, because Quinn was never indicted, this court lacks the ability to grant any relief for the alleged Sixth Amendment violation. Quinn therefore lacks standing to assert his Sixth Amendment claim.[7] *See Vt. Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 771 (2000) (stating that constitutional standing requires that the alleged injury be redressable by the courts, and that in order to demonstrate redressability, the plaintiff must show a "substantial likelihood that the

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[7] In any event, although the protection afforded by the Sixth Amendment attaches upon arrest, not only indictment, such that the period between arrest and indictment must be considered in evaluating a Speedy Trial Clause claim, preindictment delay alone cannot constitute a violation of the Sixth Amendment right to a speedy trial. There can be no violation of the Sixth Amendment right to a speedy trial in the absence of a criminal indictment. *See United States v. MacDonald,* 456 U.S. 1, 7 (1982) ("[N]o Sixth Amendment right to a speedy trial arises until charges are pending."); *see also United States v. Carlock,* 806 F.2d 535, 549 (5th Cir.1986) ("There is no sixth amendment right to a timely indictment.").

requested relief will remedy the alleged injury in fact" (citations and internal quotation marks omitted)); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992) ("[I]t must be likely . . . that the injury will be redressed by a favorable decision." (citations and internal quotation marks omitted)).

The district court properly dismissed Quinn's Sixth Amendment speedy trial claim.

2. Due Process Claim

For a preindictment delay to violate the due process clause it must not only cause the accused substantial, actual prejudice, but the delay must also have been intentionally undertaken by the government for the purpose of gaining some tactical advantage over the accused in the contemplated prosecution, or for some other impermissible, bad faith purpose. *United States v. Crouch,* 84 F.3d 1497, 1514 (5th Cir.1996) (en banc). To establish prejudice, the defendant must offer more than mere speculation of lost witnesses, faded memories or misplaced documents; he must show an actual loss of evidence that would have aided the defense and that cannot be obtained from other sources. *United States v. Gulley,* 526 F.3d 809, 820 (5th Cir.2008) (citing *Crouch,* 84 F.3d at 1515). The due process prejudice standard is thus far more stringent than the speedy trial prejudice standard. This Court has underscored the difficulty of meeting this standard, noting that "it is difficult to imagine how a pretrial showing of

prejudice would not in almost all cases be to some significant extent speculative and potential rather than actual and substantial." *Crouch,* 84 F.3d at 1516. The burden is on the defendant to prove both prongs of the test. *United States v. Avants,* 367 F.3d 433, 441 (5th Cir.2004). In this case, Quinn has failed to allege the sort of prejudice required to state a claim for a violation of his due process rights as a result of preindictment delay.

B. Qualified Immunity

The district court held that the District Attorney Defendants in their individual capacities were entitled to qualified immunity from Quinn's federal claims on the grounds that Quinn had failed to allege facts that could establish a constitutional violation. As discussed above, we agree with the district court's analysis on this point. The District Attorney Defendants are entitled to qualified immunity with respect to Quinn's federal claims.

C. Prosecutorial Immunity

The district court held that any claims against the District Attorney Defendants in their individual capacities for their actions taken in the course of prosecuting Quinn are barred by absolute prosecutorial immunity. Quinn argues that a prosecutor's acts must occur at trial to fall within the ambit of prosecutorial immunity.

Prosecutors are absolutely immune from § 1983 suits in their individual capacities for actions that are within the scope of their prosecutorial duties. *Brooks v. George County, Miss.*, 84 F.3d 157, 168 (5th Cir.1996) (citing *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976)). Prosecutorial immunity has been extended to a prosecutor's actions in initiating, investigating, and pursuing a criminal prosecution. *McGruder v. Necaise*, 733 F.2d 1146, 1148 (5th Cir.1984); *Cook v. Houston Post*, 616 F.2d 791, 793 (5th Cir.1980). The decision to file or not file criminal charges is protected by prosecutorial immunity. *Oliver v. Collins*, 904 F.2d 278, 281 (5th Cir.1990). In this case, Quinn is suing the District Attorney Defendants for waiting fifteen months after he was arrested to seek an indictment. The alleged wrongful act concerns the decision of when and whether to file criminal charges, which clearly falls within the scope of the District Attorney Defendants' prosecutorial duties. *See Oliver*, 904 F.2d at 281; *McGruder*, 733 F.2d at 1148; *Cooke*, 616 F.2d at 793. Quinn's contention that prosecutors are only entitled to prosecutorial immunity when they are engaged in advocacy before a court has been clearly rejected by the Supreme Court. *See Van De Kamp v. Goldstein*, 129 S.Ct. 855, 861-65 (2009) (holding that prosecutorial immunity applied to acts related to establishment of office administrative procedures regarding how and when to make impeachment information available at a trial); *Imbler*, 424 U.S. at 431 n.33 ("We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary

to the initiation of a prosecution and actions apart from the courtroom.").

We agree with the district court that any claims against the District Attorney Defendants in their individual capacities for their actions taken in the course of prosecuting Quinn are barred by absolute prosecutorial immunity

D. Eleventh Amendment Immunity

Quinn argues that the district court erred by finding that the county prosecutors were protected by Eleventh Amendment immunity from being sued in their official capacities for their actions in handling the criminal case against Quinn because they are county, not state, officials. This circuit has stated on numerous occasions that district attorneys and assistant district attorneys in Texas are agents of the state when acting in their prosecutorial capacities. *See, e.g., Esteves v. Brock,* 106 F.3d 674, 678 (5th Cir.1997) (holding that a district attorney acted as a state official in using peremptory challenges during jury selection); *Krueger v. Reimer,* 66 F.3d 75, 77 (5th Cir.1995) (holding that the actions of a Texas district attorney within the scope of his prosecutorial function during a criminal proceeding do not constitute official policy for which a county can be held liable); *Echols v. Parker,* 909 F.2d 795, 801 (5th Cir.1990) (holding that a Texas district attorney is a state official when instituting criminal proceedings to enforce state law); *cf. Crane v. Texas,* 766 F.2d 193 (5th Cir.1985)

(holding that Texas district attorney acted as county official in setting county policy for the authorization of misdemeanor warrants). The District Attorney Defendants in this case were clearly acting in their capacities as prosecutors in determining whether and when to bring charges against Quinn. *See Echols*, 909 F.2d at 801. The District Attorney Defendants are protected by Eleventh Amendment immunity with respect to their actions in handling the criminal case against Quinn.

E. Injunctive Relief

Quinn appeals the district court's holding that he lacks standing to seek injunctive relief because he has failed to allege a likelihood of a future violation of his rights. Quinn asserts that he has standing to pursue an injunction against the County Defendants because they have asserted that they are capable of re-urging the child-abuse charges against Quinn at any time through 2015. He also asserts that he has third-party standing in light of the fact that new charges in an unrelated matter were filed against him in August 2006 and the County Defendants may "drag out" the prosecution of that case and cases against other accused persons.

To satisfy the standing requirement, a plaintiff seeking injunctive relief must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged conduct. *Armstrong v. Turner Indus., Inc.*, 141 F.3d

554, 563 (5th Cir.1998) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)). The injury or threat of injury must be both real and immediate, not merely conjectural or hypothetical. *Id.* at 563 n.23 (citing *Lyons*, 461 U.S. at 102). The mere fact that the County Defendants have stated that they are capable of re-urging the child abuse charges does not constitute a direct threat, let alone an immediate one. *Cf. Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (holding that threats of prosecution were not imaginary or speculative when plaintiff had been twice warned to stop handbilling and was told by the police that if he handbilled again and disobeyed a warning to stop he would likely be prosecuted). Similarly, the asserted threat of Quinn's or another person's case being "dragged out" is vague, speculative, and not necessarily immediate. Quinn does not have standing to seek injunctive relief.

Accordingly, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS SHERMAN DIVISION

JOHN GERARD QUINN,	§	
Plaintiff,	§	
	§	
v.	§	
JOHN ROACH, individually and in his official capacity as Collin County District Attorney, GAIL LEYKO, MANUEL GONZALES, CURTIS HOWARD, KRISTI TYLER, and MICHELLE VOIRIN, individually and in their official capacities as Collin County Assistant District Attorneys, JOSE QUILES, and FIVE JOHN DOE DEFENDANTS, individually and in their official capacities as McKinney, Texas police officers, LAURIE HOUSTON and KATIE QUINN, individually, COLLIN COUNTY, TEXAS and THE CITY OF MCKINNEY, TEXAS,	§	4:06cv120
Defendants.	§	

MEMORANDUM ADOPTING THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

(Filed Mar. 23, 2007)

Came on for consideration the above-referenced civil action, this court having heretofore ordered this

case be referred to the United States Magistrate Judge for all pretrial purposes.

The report of the United States Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of "Collin County Defendants' Motion to Dismiss" [Dkt. No. 64], has been presented for consideration.

The court having made a *de novo* review of the objections raised by Plaintiff thereto, is of the opinion that the findings and conclusions of the Magistrate Judge are correct, and the objections of Plaintiff are without merit. The court notes that on page 7 of the Magistrate Judge's Report the word "shown" should be replaced by the word "pled" in the following sentence: "The Court finds that Plaintiff has *shown* no such conduct that would subject the County to liability under Section 1983." Subject to this change, the court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of this court. It is, therefore,

ORDERED that the Magistrate Judge's Report is **ADOPTED** as the opinion of the Court.

SIGNED this 22nd day of March, 2007.

/s/ Richard A. Schell
RICHARD A. SCHELL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS SHERMAN DIVISION

JOHN GERARD QUINN, Plaintiff, v. JOHN ROACH, individually and in his official capacity as Collin County District Attorney, GAIL LEYKO, MANUEL GONZALES, CURTIS HOWARD, KRISTI TYLER, and MICHELLE VOIRIN, individually and in their official capacities as Collin County Assistant District Attorneys, JOSE QUILES, and FIVE JOHN DOE DEFENDANTS, individually and in their official capacities as McKinney, Texas police officers, LAURIE HOUSTON and KATIE QUINN, individually, COLLIN COUNTY, TEXAS and THE CITY OF MCKINNEY, TEXAS, Defendants.	§ § § § § § § § § § § § § § § § § § § §	4:06cv120

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE GRANTING COLLIN COUNTY DEFENDANTS' MOTION TO DISMISS

(Filed Mar. 7, 2007)

On this day came on for consideration Collin County Defendants' Motion to Dismiss [Dkt. No. 64].

Having considered the motion, Plaintiff's response, Defendants' reply and Plaintiff's sur-reply, the Court is of the opinion the motion should be Granted.

Plaintiff John Quinn has filed this complaint against the Collin County District Attorney, John Roach, and a number of assistant district attorneys, police officers, individual defendants, and city and county organizations. Plaintiff asserts jurisdiction under Title 28 United States Code, Section 1331 and Title 42 United States Code, Section 1983. This is in essence a divorce and child custody case gone bad. Plaintiff's pleadings are at best a rambling diatribe against all defendants in this case. The Court will try to dissect what is really relevant from what is nothing more than a hostile attack on all defendants involved.

According to Plaintiff Quinn, Plaintiff and one of the defendants, Laurie Quinn Houston ("Houston"), divorced in 1991 after Plaintiff discovered she was having an extra-marital affair. Plaintiff was evidently awarded custody of the two minor children. Plaintiff alleges that one of the minor children went to live, at some point in time, with Houston. Plaintiff claims that Houston and his daughter were engaged in a questionable lifestyle. Plaintiff states that he was not aware of this lifestyle and made contributions to his daughter's support. Later on, Houston sued for additional child support. To avoid a fight, Plaintiff agreed to pay more money. At some point after the increase in child support, Plaintiff's financial circumstances changed and he and Houston went to mediation. The

parties apparently agreed to a reduction in the amount of child support. During all this time, Plaintiff claims that his daughter was suffering from mental problems and that she tried to commit suicide twice.

Plaintiff alleges that the "troubled minds" of his former wife and daughter concocted a scheme to either get more money from him or divert attention away from his daughter's troubles. His daughter allegedly informed her mother that Plaintiff had sexually molested her when she was 6 or 8 years old. Plaintiff claims that this was purely a fabrication. Houston seized on the opportunity and reported this to the authorities.

On or about July 14, 2004, Houston filed a complaint with the Denton County Child Protective Services alleging that Plaintiff had raped his daughter. Denton County did not interview or contact Plaintiff concerning the charges. He states that the affidavit of his daughter was fraught with lies. It appears that the Denton authorities did not proceed on the allegations. Undaunted, Houston then went to the McKinney police and filed a formal complaint. It appears that the officer investigating this complaint was Defendant Quiles. According to Plaintiff, Quiles made no investigation of the reported complaint. Plaintiff states that evidence even existed that no assault had occurred and that this was known by Quiles. Notwithstanding the complete lack of credible evidence, Plaintiff states that a warrant was issued

charging him with Aggravated Sexual Assault. Plaintiff claims that various members of the district attorney's office had to review the affidavit and pass on its merits. Further, Plaintiff complains that the affidavit does not list any of the exculpatory evidence existing at the time. In fact, Plaintiff states that the affidavit of Quiles is perjured.

In September, the Denton County authorities dropped the investigation and supposedly informed Quiles that they were unable to make a determination. Plaintiff was eventually no-billed, after a 15 month delay in getting this matter before a grand jury; and then only, after he had successfully filed a writ of habeas corpus.

Defendants Roach, Gonzales, Howard, Leyko, Tyler, and Voirin have filed a Motion to Dismiss under FRCP Rule 12(b)(6) [Dkt. 64]. The Court will refer to these defendants as the "DA Defendants."

Federal Rule of Civil Procedure 12(b)(6) Standard

When deciding a motion to dismiss under Rule 12(b)(6), the court must accept the plaintiff's factual allegations as true and resolve doubts as to the sufficiency of the claim in the plaintiff's favor. *Vulcan Materials Co. v. City of Tehuacana,* 238 F.3d 382, 387 (5th Cir.2001). Mere legal or constitutional are not sufficient. *Fee v. Herndon,* 900 F.2d 804, 807 (5th Cir.1990) *cert. den.* 498 U.S. 908 (1990).

Discussion

The gravamen of Plaintiff's complaint with these DA Defendants is that there was a 15 month delay from his arrest until the presentation of his case to the Grand Jury. No constitutional rights were violated in this delay. The Fifth Circuit has addressed this issue in other cases. To show some prejudice resulting from delay, the indictment must be barred by the statute of limitations and there must be a showing of prejudice. That prejudice must also be accompanied by a showing that the indictment or prosecution was delayed to gain a tactical advantage or for some other bad faith purpose. *U.S. v. Crouch,* 84 F.3d 1497 (5th Cir. 1996). In *Crouch,* the Court considered whether a seven-year delay was impermissible and found that it was not. Here, Plaintiff was no-billed within the limitations period. He states no claim for violation of his constitutional rights for the delay for which he complains. Since he was no-billed Plaintiff cannot show that any delay, if it was improper, caused actual, substantial prejudice to his defense. *U.S. v. Avants,* 367 F.3d 433 (5th Cir. 2004); *see also U.S. v. Jiminez,* 256 F.3d 330 (5th Cir. 2001) (finding that a 5 year pre-indictment delay did not violate defendant's due process rights). Moreover, the DA Defendants, when sued in their official capacities, are state officials, not local officials, for purposes of liability arising out of their prosecutorial decisions and are therefore are entitled to 11th Amendment Immunity. *Esteves v. Brock,* 106 F.3d 674 (5th Cir. 1997), *cert. denied* 522 U.S. 828 (1997). As a result,

the DA Defendants' motion to dismiss should be granted as to Plaintiff's claims asserted against them in their official capacities.

The DA Defendants also argue that they are entitled to qualified immunity from being sued in their individual capacities. The Court agrees. Qualified immunity shields government officials performing discretionary functions from individual liability for civil damages "insofar as their conduct does not violate clearly established rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *Thompson v. Upshur County,* 245 F.3d 447, 456 (5th Cir. 2001). Qualified immunity serves to ensure that before a government official can be subjected to suit in her individual capacity, she is on notice that her conduct is unlawful. *Saucier v. Katz,* 533 U.S. 194, 206, 121 S. Ct. 2151, 2158, 150 L.Ed.2d 272 (2001). Whether a government official is shielded from suit by qualified immunity is determined by a two-step analysis. *Flores v. City of Palacios,* 381 F.3d 391, 395 (5th Cir. 2004); *see also McClendon v. City of Columbia,* 305 F.3d 314, 323 (5th Cir. 2002) (noting that when a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense). First, the court must determine whether the plaintiff's allegations, if true, establish a constitutional violation. *Hope v. Pelzer,* 536 U.S. 730, 736, 122 S. Ct. 2508, 2513, 153 L.Ed.2d 666 (2002). And when qualified immunity is asserted, Plaintiffs are required to specifically plead the facts

establishing the right to recover. *Shultea v. Wood*, 47 F.3d 1427, 1430 (5th Cir. 1995). Second, the court must determine whether a particular defendant's actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Hope*, 536 U.S. at 739.

For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)) (internal citation omitted). As previously determined in this Report, Plaintiff has failed to allege facts that establish a constitutional violation, and DA Defendants are therefore protected by qualified immunity from being sued in their individual capacities.[1] Accordingly, the individual claims against the DA Defendants should be dismissed for failure to state a claim.

---

[1] Plaintiff also argues that he has a Sixth Amendment claim because the pre-indictment delay violated his right to a speedy trial. However, any pre-indictment delay does not give rise to a speedy trial claim; rather, it involves a due process claim. *United States v. McDonald*, 456 U.S. 1, 7 (1982). Further, Plaintiffs claim for Fourth Amendment violations does not involve the DA Defendants or Collin County.

The rest of Plaintiff's complaints center around the policies enacted or the failure to enact certain policies by the DA and his office. First, Section 1983 does not create supervisory liability based on *respondeat superior* or any other theory of vicarious liability. *Oliver v. Scott,* 276 F.3d 736, 742 (5th Cir. 2003). Therefore, any claims as to failure to properly train or supervise do not merit constitutional scrutiny. Any complaint about Roach or the other DA Defendants individually for their acts personally in the course of prosecuting Plaintiff are barred by the doctrine of absolute immunity. *Cousin v. Small,* 325 F.3d 627, 635 & n.11 (5th Cir. 2003). The Court does not agree with Plaintiff that such acts must occur at trial. Therefore, Plaintiff's claims for failure to train or supervise should be dismissed.

As to the liability of the County, the Fifth Circuit has established clear guidelines on what constitutes an "official policy" under Section 1983 for the purposes of municipal liability:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled

> as to constitute a custom that fairly represents municipal policy.

Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir.1984) (en banc) (per curiam), *cert. denied*, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985). *Accord Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force,* 379 F.3d 293, 309 (5th Cir.2004); *Cozzo v. Tangipahoa Parish Council-President Gov't,* 279 F.3d 273, 289 (5th Cir.2002). The Court finds that Plaintiff has shown no such conduct that would subject the County to liability under Section 1983.

Plaintiff also seeks permanent injunctive relief against the DA Defendants and Collin County. However, Plaintiff has failed to allege a likelihood of a future violation of his rights. As a result, Plaintiff lacks standing to seek injunctive relief against DA Defendants and Collin County. *See Armstrong v. Turner Industries, Inc.,* 141 F.3d 554, 563 (5th Cir. 1998) (determining that a party's failure to allege future injury precludes injunctive relief for lack of standing). Accordingly, Plaintiff's claim for injunctive relief against the DA Defendants and Collin County should be dismissed.

Conclusion

For the foregoing reasons, Collin County Defendants' Motion to Dismiss should be GRANTED, and Plaintiff's claims against Defendants John Roach, Gail Leyko, Manuel Gonzales, Curtis Howard, Kristi Tyler, Michelle Voirin and Collin County, Texas

should be dismissed for failure to state a claim upon which relief can be granted.

Recommendation

Based upon the foregoing, it is the Court's recommendation that Collin County Defendants' Motion to Dismiss should be [Dkt. No. 64] should be GRANTED.

Within ten (10) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. § 636(b)(1)(C).

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn,* 474 U.S. 140, 148 (1985); *Rodriguez v. Bowen,* 857 F.2d 275, 276-77 (5th Cir.1988).

SIGNED this 7th day of March, 2007.

/s/ Don D. Bush
DON D. BUSH
UNITED STATES
MAGISTRATE JUDGE

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

June 11, 2009

Mr. David Maland
Eastern District of Texas, Sherman
United States District Court
216 Federal Building
Sherman, TX 75090-0000

No. 08-40633, Quinn v. Roach, et al
USDC No. 4:06-CV-120

(Filed Jun. 15, 2009)

Enclosed for the Eastern District of Texas, Sherman only, is a copy of the judgment issued as the mandate.

Enclosed is a copy of the judgment issued as the mandate.

Record/original papers/exhibits are returned:

(2) Envelopes (SEALED)

Enclosed for the Eastern District of Texas, Sherman and counsel is the approved bill of costs.

The electronic copy of the record has been recycled.

CHARLES R. FULBRUGE III,
Clerk

By: /s/ Chris P. Descant
Chris P. Descant, Deputy Clerk
504-310-7704

cc: (letter only)
Mr. Thomas Phillip Brandt
Mr. Robert Jacob Davis
Ms. Laurie Houston
Mr. James A. Pikl
Ms. Katie Quinn
Mr. John Francis Roehm III
Honorable Richard A. Schell

P.S. to Judge Schell: A copy of the opinion was sent to your office via email the day it was filed.

Mandate Issued – MDT-1 (lag, tax, img)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-40633

JOHN QUINN,

Plaintiff-Appellant

v.

JOHN ROACH, individually and in his official capacity as Collin Co District Attorney; GAIL LEYKO, Individually and in official capacity; MANUEL GONZALES, individually and in official capacity as Collin Co Assistant District Attorney; CURTIS HOWARD, Individually and in official capacity as Collin Co Assistant District Attorney; KRISTI TYLER, Individually and in official capacity as Collin Co Assistant District Attorney; MICHELLE VOIRIN, Individually and in official capacity as Collin Co Assistant District Attorney; JOSE QUILES, Individually and in official capacity as McKinney Texas police officer; JOHN DOES, 1-5 Defendants, Individually and in their official capacity as McKinney Texas police officers; LAURIE HOUSTON; KATIE QUINN; COLLIN COUNTY TEXAS; CITY OF MCKINNEY,

Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Texas, Sherman

ON PETITION FOR REHEARING EN BANC

(Filed Jun. 3, 2009)

(Opinion ___, 5 Cir., ___, ___, F.3d ___)

Before, JONES, WIENER, and BENAVIDES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Fortunato P. Benavides
United States Circuit Judge

Order on pet EB treat as pan reh-REHG6A

U.S. Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of

the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitution, Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Constitution, Amendment XIV (relevant part, section 1)

* * *

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

---

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Texas Code of Criminal Procedure, art. 32.01: Defendant in Custody and no Indictment Presented

When a defendant has been detained in custody or held to bail for his appearance to answer any criminal accusation, the prosecution, unless otherwise ordered by the court, for good cause shown, supported by affidavit, shall be dismissed and the bail discharged, if indictment or information be not presented against such defendant on or before the last day of the next term of the court which is held after his commitment

or admission to bail or on or before the 180th day after the date of commitment or admission to bail, whichever date is later.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JOHN GERARD QUINN Plaintiff vs. JOHN ROACH, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COLLIN COUNTY DISTRICT ATTORNEY, GAIL LEYKO, MANUEL GONZALES, CURTIS HOWARD, KRISTI TYLER, AND MICHELLE VOIRIN, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS COLLIN COUNTY ASSISTANT DISTRICT ATTORNEYS, JOSE QUILES AND FIVE JOHN DOE DEFENDANTS, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITY AS MCKINNEY, TEXAS POLICE OFFICERS, LAURIE HOUSTON AND KATIE QUINN, INDIVIDUALS, COLLIN COUNTY, TEXAS AND THE CITY OF MCKINNEY, TEXAS DEFENDANTS	)	CASE NO. 4:06CV120

****

ORAL DEPOSITION OF
JOSE QUILES
MARCH 2, 2007

****

[2] ORAL DEPOSITION OF JOSE QUILES, produced as a witness at the instance of the Plaintiff, and duly sworn, was taken in the above-styled and numbered cause on the 2nd day of March, 2007, from 10:11 a.m. to 12:03 p.m., before Tim Fails, CSR in and for the State of Texas, reported stenographically, at the offices of Fanning, Harper & Martinson, LLP, Two Energy Square, 4849 Greenville Avenue, Suite 1300, Dallas, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

* * *

[19] Q. Do you understand that you have been sued and the allegations are that you obtained an arrest warrant for Mr. Quinn without probable cause?

A. Yes, sir.

Q. Do you understand that?

A. Yes, sir.

Q. And you understand what probable cause is, don't you?

A. I do.

Q. Explain to us in your best recitation of what probable cause means, what that term means.

A. It's a set of facts or apparent facts that would lead a reasonable person to believe that a crime is committed or is being committed, has been or is being committed.

Q. Okay. Do you understand about a term they use in police work called reasonable suspicion or – yeah, reasonable suspicion?

A. Yes, sir.

Q. Okay. What's the difference?

What is reasonable suspicion?

A. It's not probable cause.

Q. Okay. So those two – probable cause and reasonable suspicion are different things, right?

A. Yes.

[20] Q. Reasonable suspicion is a lesser standard of proof than probable cause, correct?

A. Correct.

Q. Okay. So on a continuum you've got nothing, no evidence; then you've got enough evidence for reasonable suspicion; then you have enough evidence for probable cause?

MR. ROEHM: Objection –

A. Correct.

MR. ROEHM: – form.

Q. (By Mr. Pikl) Is that how you understand it?

A. Correct.

Q Are you familiar with the written policies and procedures of the McKinney Police Department as they relate to your job?

A. Yes, sir.

(Exhibit 1 marked)

Q. (By Mr. Pikl) Let me show you Deposition Exhibit No. 1 which I have marked. And I will represent to you that that document is a fax cover sheet from Fanning, Harper & Martinson followed by approximately – actually not approximately – followed by 10 pages of records that your law firm sent to me in response to a request for all of the McKinney Police Department's policies and procedures relating to arrest and probable

* * *

[41] Q. State your name for the record. I don't know. What do you mean original question?

A. You were talking about exhibits.

Q. Yeah, my exhibit was – or my question was – and I was leading up to this question. I'll just ask it now or ask it again if I'm asking it twice.

On September 8th, 2004 when you swore out your probable cause affidavit the only written

physical evidence you had about this offense – alleged offense was Deposition Exhibit 3, which is an authorization for release; Deposition Exhibit 4, which was the information sheet from CAC; Deposition Exhibit 5, which was the intake report; Deposition Exhibit 6, which is Laurie Houston's written statement; and Deposition Exhibit No. 7, which is Nurse Turner's affidavit, correct?

A. Correct.

Q. And then there is also a document out there which is called your offense report, which is basically your notes, that also contains substantially the same information as your probable cause affidavit?

A. Yes, sir.

Q. Okay. Now, I want to go through those one at a time.

A. Right.

Q. Let me ask you this first.

* * *

[49] had happened to her. It didn't appear to me that Katie was lying, Katie was coached, she was making this up in any way.

MR. PIKL: Objection; form.

Q. (By Mr. Pikl) The question is what steps did you take, if any, to verify the truthfulness of the outcry?

A. Well, the steps I took was my training and experience, the outcry statement – I mean, the statement from the outcry witness; the statement and affidavit from the nurse at the hospital; the intake report from CPS which stated that the hospital staff believed because of her psychological reactions that this abuse might have occurred. Those are the steps I took to establish my probable cause to present before a magistrate.

MR. PIKL: Objection; nonresponsive.

Q. (By Mr. Pikl) The question is – well, let me ask you straight up. Did you take any steps other than looking at reports of this outcry to verify the truthfulness of Katie, whether she was a truthful person or not?

A. The steps that I have told you is the steps that I took in my investigation.

Q. Did you know when Katie made this outcry before you did your probably cause affidavit that when she first [50] made this outcry she had just been arrested that day for shoplifting?

A. Yes.

Q. Is shoplifting a crime of dishonesty or deceit?

A. Yes, sir.

Q. Okay. When you have a person making an outcry of any crime to you that has been recently accused of a crime of deceit do you automatically take their word for it?

A. No, sir.

Q. Okay. In this investigation, Mr. Quiles, the only thing you ever had, although you have multiple versions of it, was Katie's outcry, correct?

A. And the statement from the outcry witness.

Q. Who is the outcry witness?

A. Laurie Houston.

Q. Laurie Houston never said she ever witnessed this abuse, did she?

A. No, she did not witness the abuse.

Q. Right.

All Laurie Houston said was Katie told me, right?

A. Yes, sir.

Q. All Nurse Turner said was Katie told me, right?

A. Correct.

[51] Q. All the people at Denton's Family and Protective Services said was Katie told me, right?

A. Yes, sir.

(Cell phone ringing)

THE WITNESS: Sorry about that. I'll shut this off right now.

Q. (By Mr. Pikl) And the outcry itself found on the videotape is just Katie saying this happened, correct?

A. Correct.

Q. So the only evidence you had in your possession when you swore out this probable cause affidavit on September 8th of 2004 was Katie's outcry made to various people?

A. Correct.

Q. Knowing that Katie had just been arrested for a crime or deceit or dishonesty the day she made this outcry, did that color in any way your review that her report might be untruthful?

A. Well, given the fact that Katie Quinn attempted suicide – which I would not think a suicide attempt would have been made on a shoplifting charge – whereas her mother was talking to her about this particular incident that happened with her shoplifting, her attempted suicide and then her immediate outcry of sexual [52] abuse led me to believe that sexual abuse was the reason for her suicide attempt.

Q. Were you aware that Katie Quinn had tried to commit suicide twice before this?

A. No, sir.

Q. Did you bother to investigate or ask anybody about that?

A. I don't recall.

Q. Did you ask her mother, Hey, has Katie tried to commit suicide before?

A. I might have. I don't know.

Q. Okay. Did you ever ask Ms. Houston, Hey, does Katie have any history of mental disturbances or illnesses?

A. I don't know.

Q. Did you know that Katie was taking Zoloft and Seroquel during the summer of 2004?

A. She had taken –

MR. ROEHM: Objection; form.

Q. (By Mr. Pikl) Zoloft and Seroquel.

A. She had taken some medication that she mentioned in the videotape.

Q. Right.

A. If I look at the transcript I can tell you what that was.

* * *

[56] Q. So basically you just took Katie's word for all this that it happened, right?

A. Yes.

Q. Were you at all suspicious that this outcry didn't come out for between four and ten years after the offense supposedly occurred?

A. No, sir.

Q. Didn't bother you at all?

A. No, sir.

Q. Now, you have this case for approximately five weeks between the original report and the time you swear out your probable cause affidavit sometime between late July and the first week of September of '04, right?

During that five-week period –

THE REPORTER: You want an answer?

MR. PIKL: I'm sorry. Yes.

Q. (By Mr. Pikl) Answer yes or no. Sorry. You can't nod your head.

A. Your question again.

Q. You investigated this matter for about five weeks, from July 30th to September 8th of 2004, correct?

A. Yes.

Q. Now, why did you make the probable cause affidavit when you did? Why didn't you wait for the SANE examination to come back?

[57] A. I don't know. I had enough probable cause at the moment to swear out my affidavit.

Q. You believed that the information you had at the time was sufficient to establish probable cause?

A. Yes, sir.

Q. Okay. I have a question for you, then, because I'm a little confused about something in your affidavit.

In the affidavit you filed in this case on Page 3 of Exhibit 2, Paragraph 8 – Paragraph 7 and 8, excuse me –

A. Which one?

Q. Paragraph 7 and 8 of Exhibit 2, Page 3. It's your affidavit you filed in this case.

Are you there with me?

A. I'm there.

Q. Okay. On Paragraph 7 and 8 you talk about the four things you had in your possession: The videotape, the service notification, the Child Advocacy Center – I guess that's it, just those three things. Those three things established in your mind, according to Paragraph 8, that you had reasonable suspicion, correct?

A. Correct.

Q. Okay. So at that time when you had those three things, which is the outcry of Katie on the

videotape, the Child Advocacy Center intake report or information [58] sheet, and the services notification, that gave you reasonable suspicion, right?

A. Right.

Q. At that time, then, you had Katie's outcry, didn't you?

A. I had it with the videotape, yes.

Q. Right.

Okay. Between that date and September 8th of '04 when you swore out your probable cause affidavit, you never had anything else except the outcry, did you?

You already testified to that, right?

A. I had the affidavit from Joy Turner and I had the witness statement from –

Q. Okay.

A. – Laurie Houston.

Q. And we have already established, I think, that Laurie Houston's statement is nothing but a hearsay report of the outcry she heard from Katie, right?

MR. ROEHM: Objection; form.

A. It's an outcry witness statement.

Q. (By Mr. Pikl) Yeah.

A. First adult that Katie had mentioned this abuse to.

Q. Right.

But it's still just a repeat of what Katie [59] told her, right?

A. I beg your pardon?

Q. It's still a repeat of what Kate told her?

A. Katie told her, right.

Q. Right.

So it's not new evidence, it's just another person Katie told, right?

A. It is the first person Katie told.

Q. Okay. So we have Katie's outcry on the videotape; we have Laurie saying Katie made an outcry; we have the Denton County Child Advocacy Center saying Katie made an outcry. All of those things, that just led you to reasonable suspicion, didn't it?

A. Yes, sir.

Q. Right? Is that correct?

A. I had reasonable suspicion when I got the intact report as it states in my – Paragraph 7 and 8 of my affidavit.

Q. Okay. Well, actually Paragraph 7 says you also had the videotape, right?

A. I did have the videotape.

Q. Which contains Katie's taped outcry?

A. Yes, sir.

Q. So you had –

MR. ROEHM: I object to form. He doesn't [60] say he reviewed the videotape. I think you implied in your question that Paragraph 8 said he reviewed the videotape. That's what Paragraph 8 says.

MR. PIKL: If you interrupt again with a speaking objection we're going to go see Magistrate Bush. That's the last time that's going to happen. I have given you two shots at it now. Do not coach the witness.

MR. ROEHM: I'm not coaching the witness.

MR. PIKL: You are coaching the witness.

MR. ROEHM: You misrepresent what Paragraph 8 said.

MR. PIKL: Then you have an opportunity on cross-examination to bring that up.

Q. (By Mr. Pikl) Paragraph 7 and 8 of your affidavit in this case, Exhibit 2, you say you have three things in your possession: A videotape of the outcry, the CPS notification intake report, and the Denton County CAC information sheet, correct?

A. Correct.

Q. And those three things led you to have reasonable suspicion to start an investigation, correct?

A. Correct.

Q. Okay. After that date when you had this reasonable suspicion you never got any more evidence, did you, that this had happened other than just other repeats [61] of the outcry, correct?

A. Okay. I reviewed the videotape –

Q. Which is the outcry.

A. – got a statement from the outcry witness –

Q. Laurie Houston.

A. – got an affidavit from the nurse at the hospital –

Q. Right.

A. – who did an assessment on Ms. Quinn.

Q. And all Nurse Turner says is, Katie told me she was abused, right?

A. Uh-huh.

Q. Okay.

A. And that's what I had, uh-huh.

Q. Okay. So according to your affidavit, Mr. Quiles, this outcry creates reasonable suspicion and

the outcry also creates probable cause, is that your testimony?

A. After reviewing the videotape –

Q. Right?

A. – and after receiving the affidavit from a medical professional, that's correct.

Q. Okay. Can I see Nurse Turner's affidavit for a minute? I think it's No. 7.

A. (Witness complying.)

[62] Q. Exhibit No. 7, Nurse Turner's affidavit, is nothing but Nurse Turner saying Katie told me she was abused, correct?

A. I don't know what the procedure was for intake assessment at the Seay Center.

MR. PIKL: Objection; form. That's not what I asked.

Q. (By Mr. Pikl) I asked: Nurse Turner's affidavit doesn't say anything about this abuse except Katie told me, correct?

A. Correct.

Q. Okay. I think you testified before you didn't know why you swore out your warrant on the day you did.

Were there any emergency circumstances or exigent circumstances in your view why this case had

to be turned over to the magistrate on September 8th of '04?

MR. ROEHM: Objection; form.

A. When this was turned over to the magistrate I had enough probable cause to swear out my probable cause affidavit; therefore, the probable cause affidavit went to the magistrate.

Q. (By Mr. Pikl) So it wasn't that you were trying to hurry, it was just that you felt like you crossed the line to probable cause and so you were ready to go?

A. Yes, sir.

* * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

John Gerard Quinn,	§	
Plaintiff,	§	
	§	
vs.	§	
JOHN ROACH,	§	CIVIL ACTION NO.
individually and	§	4:06cv120
in his official capacity as	§	
Collin County District	§	
Attorney, et al.,	§	
Defendants.	§	

AFFIDAVIT OF MELVIN TUCKER

1. My name is Melvin Tucker and I was retained as a police procedures expert by counsel for John Gerard Quinn in this case. I was asked to analyze the facts of this case against a backdrop of the protocols followed by law enforcement officers when conducting investigations into allegations of criminal conduct in 2004 and to render my opinions as to whether the investigation protocols were followed by McKinney, Texas Police Officer Jose Quiles.

2. During the time period 1969-1979, I served as an FBI Agent and Chief of Police in Morristown, Tennessee; Hickory, North Carolina; and Asheville, North Carolina. From October 1979 until January 1994, I served as the Chief of Police in Tallahassee, Florida.

3. I served as a member and chairman of the North Carolina Criminal Justice Education and Training Council for three years and as a member and vice-chairman of the Florida Criminal Justice Standards and Training Commission for three years. In those positions, I had the responsibility for the development and approval of training programs, including the training curriculum for conducting criminal investigations, for all state and local law enforcement agencies in the respective states during that time period.

4. Throughout my law enforcement career I trained hundreds of law enforcement officers on the proper conduct of criminal investigations. I personally conducted investigations into criminal offenses and reviewed criminal investigations conducted by officers to determine whether or not the legal standards and recognized protocols were followed.

5. I have attended seminars, reviewed professional literature, and studied extensively the subject of criminal investigations and the levels of proof necessary to detain an individual for investigation (reasonable suspicion) or to arrest an individual for a crime (probable cause).

6. I served as an adjunct faculty member teaching Criminal Justice courses at Western Carolina University, Florida State University, Florida A&M University, Tallahassee Community College, Walters State Community and the University of Maine. I taught a criminal investigations course for several years while on the adjunct faculty at Florida A&M University.

7. I have been a certified law enforcement officer in Tennessee, North Carolina and Florida and am currently a Major with the Hamblen County, Tennessee Sheriff's Department. My current duties are to conduct training for members of the Hamblen County Sheriff's Department on high-risk operations and to develop and review department policy. I am also certified by the National Institute of Ethics (NIE) as a law enforcement ethics instructor and by the American Society for Law Enforcement Trainers (ASLET) as a law enforcement trainer.

8. I completed my bachelor's degree at the University of South Florida, Tampa, Florida and my master's degree at Appalachian State University, Boone, North Carolina. My complete curriculum vita is attached as Appendix A.

9. I understand that expert testimony must be objective and the expert must not be an advocate for any party involved in a lawsuit.

10. I understand that a witness's credibility is a matter for consideration by the trier of fact and not a proper consideration for expert testimony. I have assumed a set of facts to be true in this case strictly for the purpose of analysis. If asked to assume other facts, I will objectively render my opinions based upon that set of facts.

11. The terminology used in expressing my opinions in this affidavit may be legal terms, however, their use is not meant to invade the purview of the court. I use these same terms when I conduct training for police officers and supervisors on high-risk police operations and police civil

liability concerns. All terms used in my affidavit are commonly understood and used by law enforcement officers, law enforcement trainers and their supervisors.

12. An opinion expressed by me in this affidavit may state a conclusion which is also an ultimate issue in the case, however, I have made every effort to support those opinions with information about common practice and understanding in the law enforcement profession so as to assist the trier of fact in understanding the evidence or in determining a fact at issue in the case under consideration.

13. I have served as a consultant in more than 350 matters relating to police practices and have testified as an expert, in both state and federal courts, approximately 50 times. I have attached, as Appendix B, the list of cases I have provided deposition or trial testimony in during the past four years.

14. As is the protocol for any expert in a case like this, I reviewed documents relevant to this case and then developed a set of assumed facts, which I then analyzed against the standards, practices, principles and protocols recognized, relied upon and employed in the law enforcement profession at the time of this incident. The list of materials I reviewed is attached as Appendix C.

15. In conducting my analysis of this incident I assumed the facts as outlined in the attached Appendix D.

16. Because of my experience as a law enforcement officer and criminal investigator, my education and training in law enforcement, my knowledge of law enforcement protocols and standards, my analysis and study in the field of law enforcement and criminal investigations and through consulting professional literature, I am aware that, prior to 2004, law enforcement officers received instruction in basic training programs and were advised in training guides published by law enforcement professional associations that the primary objective of a preliminary investigation is to determine whether or not a crime has been committed. Although officers are instructed in basic training programs that an obviously reliable victim's statement is sometimes sufficient to establish probable cause, they also are instructed that the officer must go beyond simply accepting, without question, everything he is told. He must examine the accounts of the parties involved, evaluate their validity and gather any other available evidence in the case to determine if a crime has been committed.

    Officers are instructed that it is their duty to discover facts, to be curious and suspicious, and not to take anything for granted or to jump to conclusions. They are also told that they should not use "mere speculation" as a basis to conclude that a crime has occurred (see International Association of Chiefs of Police Training Key #260 entitled *Preliminary Investigations* attached as Appendix E).

17. Because of my experience as a law enforcement officer and criminal investigator, my education and training in law enforcement, my knowledge of law enforcement protocols and standards, my analysis and study in the field of law enforcement and criminal investigations and through consulting professional literature, I am aware that, prior to 2004, law enforcement officers were taught, in basic law enforcement training programs, that reasonable suspicion to detain a person for investigative purposes is a lower level of proof than that which an officer must have to arrest an individual. Officers are taught in basic law enforcement training programs that reasonable suspicion does not give an officer the authority to arrest and the officer must conduct a more thorough investigation to develop a level of proof that would cause him to reasonably believe (probable cause) that a crime had been committed, was being committed or was about to be committed before he can arrest an individual.

18. Law enforcement training documents, published by law enforcement professional associations prior to 2004, advised officers that the determination of probable cause (that level of proof that would cause the officer to reasonably believe that a crime had been committed) is a "balance sheet process." This "balance sheet process" simply means that as an officer conducts a preliminary investigation, he accumulates information that either supports probable cause (incriminating information) or undermines probable cause (exculpatory information). The officer then makes a decision as to whether or not

probable cause exists by balancing the incriminating facts against the exculpatory facts. (see International Association of Chiefs of Police Training Key #136 entitled *Probable Cause* attached as Appendix F).

19. Because of my experience as a law enforcement officer and criminal investigator, my education and training in law enforcement, my knowledge of law enforcement protocols and standards, my analysis and study in the field of law enforcement and criminal investigations and through consulting professional literature, I am aware that, prior to 2004, law enforcement officers were taught in basic law enforcement training programs that, when seeking an arrest warrant, an officer has a ministerial responsibility to make the judicial officer aware of all incriminating and exculpatory information he has learned about through his preliminary investigation so that the judicial officer can make an informed decision as to the existence of sufficient evidence to support the issuance of an arrest warrant.

20. Because of my experience as a law enforcement officer and criminal investigator, my education and training in law enforcement, my knowledge of law enforcement protocols and standards, my analysis and study in the field of law enforcement and criminal investigations and through consulting professional literature, I am aware that since the late 1980's law enforcement officers have also been receiving instruction in basic training programs on the meaning of the phrase "objective reasonableness." Officers have been told that, when an evaluation of their

actions is undertaken to determine whether they were "objectively reasonable" the question asked will be whether other officers, if confronted with the same or similar circumstances, would have responded in the same manner. If the answer is yes, then their actions may be deemed "objectively reasonable."

21. After a review of the facts of this case, I hold the opinion, to a reasonable degree of professional certainty, that Detective Jose Quiles preliminary investigation into the allegation made by Katie Quinn that her father, John Quinn, had sexually abused her four to eight years earlier, was inadequate and fell below the standard of care for the proper conduct of a preliminary investigation because Quiles failed to conduct a sufficient investigation to determine whether a crime, in fact, had occurred. My opinion is based upon the following:

    (1) Quiles failed to interview Katie Quinn even though she had made inconsistent statements to several persons and made the allegations four to eight years after the alleged acts were supposed to have occurred;

    (2) Katie Quinn made her allegation after being arrested for shoplifting which may have motivated her to make the allegation to take attention away from her and place it elsewhere;

    (3) Quiles failed to interview the accused father before arresting him to determine if he had any proof to counter her allegations;

(4) Quiles failed to interview other persons who may have been able to advise him as to Katie Quinn's credibility; and

(5) Quiles "speculated" as to what the SANE Report (Sexual Assault Nurse Examiner Report) results would show (see ¶ 19 Quiles Affidavit).

22. I hold the opinion, to a reasonable degree of professional certainty, that Detective Jose Quiles had a ministerial duty to conduct a thorough and complete preliminary investigation into the allegation made by Katie Quinn to determine whether the allegation was supported by any evidence to support probable cause believe that a crime had occurred before arresting John Quinn (see International Association of Chiefs of Police Training Key #260 entitled *Preliminary investigations* attached as Appendix E).

Even though no exigent circumstances existed that required Detective Quiles to move rapidly to arrest John Quinn (other than a statement from Laurie Houston that Quinn was a flight risk and suicidal), Quiles arrested John Quinn knowing that a CPS report would be forthcoming which could be either exculpatory or incriminating in nature.

Detective Jose Quiles was also aware of, but apparently ignored, the fact that the Colony [sic] Police Department had filed no charges relating to Katie's allegations and he failed to interview John Quinn, Katie's father, or Bryan Quinn, Katie's brother, about whether or not Katie was a reliable and truthful person or whether either of

them knew of prior statements of sexual abuse, other evidence of alleged crimes, or whether Katie may have had ulterior motives for making allegations that she had been sexually abused. Detective Quiles also knew that Katie's allegations were made at a time when Katie had been arrested for shoplifting and may have had a reason to lie to deflect attention away from her own crime and may also explain why her versions of the facts were inconsistent.

The only evidence Detective Quiles relied upon to arrest John Quinn was the allegation made by Katie that was not independently corroborated by any other evidence, was made by a teenager of unknown reliability during a time of great personal stress and the versions of the allegations varied in detail. This was insufficient to give an objectively reasonable officer the level of proof necessary to conclude that probable cause existed that John Quinn had committed a crime. Detective Quiles ignored exculpatory information such as the Texas Department of Family and Protective Services investigation into the allegations made by Katie which concluded, on September 10, 2004, that there was insufficient proof to make a determination as to whether the allegations were true (see Texas Department of Family and Protective Services CPS Investigation Reading Tool pages 1 and 2). CPS concluded, following its investigation, that Katie could provide very little detail about the alleged sexual assaults (see page 2 of CPS Structured Narrative Report), her SANE examination was reported as normal (see page 3 of CPS Structured Narrative Report), and Mr.

Curtis Howard, Collin County DA Office, was concerned about the inconsistent statements Katie had made to him, the CPS case worker, and SANE (see page 3 of CPS Structured Narrative Report), the CPS worker was concerned as to why Katie did not make an outcry when she alleged the acts occurred (see page 4 of CPS Structured Narrative Report), and the SANE exam found no old trauma (see page 4 of CPS Structured Narrative Report).

Because their [sic] was no medical evidence to support the contention that Katie had been sexually abused and her testimony evidence regarding the alleged events was inconsistent., Detective Quiles could not have reasonably believed that probable cause existed for the arrest of John Quinn.

23. After a review of the facts of this case, I hold the opinion, to a reasonable degree of professional certainty, that the arrest of John Gerard Quinn by Detective Quiles on September 12, 2004, for aggravated sexual assault of a child, was not objectively reasonable because the arrest was not based upon sufficient proof to establish arguable probable cause to believe that John Gerard Quinn had committed a crime, and no reasonable officer would have believed that probable cause existed for the arrest of John Gerard Quinn or sought an arrest warrant without further investigation.

In this case Detective Quiles had both incriminating and exculpatory information to use in the "balance sheet process" before making a probable

cause determination. However, he ignored the information he was aware of which would have been exculpatory in nature or would go against the credibility of Katie Quinn including (1) the inconsistencies in the statements made by Katie Quinn, (2) that a child support battle was on-going between Katie's mother, Laurie Houston and her father John Quinn, (3) that Katie Quinn had been arrested for shoplifting just prior to her making the allegation of abuse, (4) that Katie had attempted suicide in the past and was not mentally stable, and (5) that Katie was under a doctor's care for bipolar disorder and schizophrenia.

The totality of facts and circumstances used by detective Jose Quiles to obtain a warrant to arrest John Quinn was limited solely to a statement made by Katie alleging sexual abuse by her father, John Quinn, and repeated or reported by others (through a Notification to Law Enforcement Agency Report, from the Texas Department of Family and Protection Services, a videotape of Katie making the allegations to Dawn Todd at the Denton County Children's Advocacy Center, an affidavit from nurse Joy Turner, who interviewed Katie Quinn at the Seay Behavioral Health Center, stating that Katie had made the allegations to her, and the statement of Laurie Houston, Katie's mother, that Katie had made the allegations to her).

24. After a review of the facts of this case, I hold the opinion, to a reasonable degree of professional certainty, that Detective Jose Quiles left out clearly critical facts when he presented his

Affidavit of Probable Cause to the judicial officer on September 9, 2004 for the authority to arrest John Quinn even though officers are instructed in basic law enforcement training programs that they have a ministerial duty to inform magistrates of both incriminating and exculpatory information known to them when applying for an arrest warrant and all reasonable police officers do so.

Detective Quiles was aware, prior to presenting his affidavit to the magistrate, of the exculpatory evidence which existed in this case and even cited the CPS Case Report and the RN's affidavit in his Probable Cause Affidavit (see Probable Cause Affidavit of Quiles sworn to on September 8, 2004 and presented to the magistrate on September 9, 2011). However, he did not make the magistrate aware of the findings of the RN or the CPS investigation and failed to advise the magistrate that Laurie Houston and John Quinn were divorced and involved in a dispute over child support payments when these allegations were made. He also failed to tell the magistrate about the suspicious circumstances under which Katie made her allegations or that several other people who reported Katie's allegations reported several significantly different versions of her story.

Date: 3-19-07 /s/ Melvin Tucker
Melvin Tucker

STATE OF TENNESSEE

HAMBLEN COUNTY

Personally appeared before me the above-named Melvin Tucker and made oath that the foregoing statements made by him are true and correct to his own personal knowledge.

/s/ [Illegible] Johnnson
Notary Public